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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. [redacted]34.

THE JURAGUA IRON COMPANY, LIMITED, APPELLANT,

vs.

THE UNITED STATES.

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APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 8, 1907.

(20,602.)

(20,602.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 637.

THE JURAGUA IRON COMPANY, LIMITED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	7	4
Argument and submission	8	4
Findings of fact	9	4
Conclusion of law	10	5
Opinion	10	5
Judgment	13	8
Application for appeal	14	8
Order allowing appeal	14	8
Clerk's certificate	15	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 12, 1907.

1 In the Court of Claims of the United States.

I.—Petition.

No. 22804. Filed February 24, 1902.

THE JURAGUA IRON COMPANY, LTD.,
vs.
THE UNITED STATES.

To the Honorable the Judges of the United States Court of Claims:

The petition of the Juragua Iron Company, Ltd., respectfully shows as follows:

1. Your petitioner is a corporation duly created and existing under the laws of the State of Pennsylvania, having been incorporated thereunder on the first day of March, A. D. 1883, and having at all times since its incorporation borne true faith and allegiance to the Government of the United States, and has not in any way aided or abetted or given encouragement to rebellion against the said Government.

2. Your petitioner was duly incorporated for the purpose, among other things, of carrying on the business of purchasing land
2 containing iron ore or other minerals, or leases or other rights to mine the same, situated in the island of Cuba, and mining said ores and bringing the same to market in the United States or elsewhere and vending and selling the same, the manufacture and sale of iron and steel or any compound thereof in said island of Cuba, and the ownership of all real estate, improvements, appliances, or agencies reasonably necessary for the mining, manufacturing, bringing to market, and selling of any property or products of the said corporation, and for the purpose of vending as merchandise in said island of Cuba or elsewhere said ores or the products thereof, together with tools, machinery, and supplies of various sorts and kinds, and for the doing of any and all things necessary and convenient for the purpose of enabling it to carry on to the best advantage the businesses above specified.

3. That the principal office and place of business of the said petitioner is now and at all times since its incorporation has been in the city of Philadelphia and the State of Pennsylvania, and, in addition to such principal office and place of business, your said petitioner, at the times hereinafter mentioned and for a long time prior thereto, had maintained and was maintaining sub-offices and subsidiary places of business in the island of Cuba, and principally in the province of Santiago de Cuba, in said island, at or near the towns, places, or ports called "Siboney," "Firmeza," and "La Cruz," and at such places owned valuable real estate containing mines of iron ore and other minerals. In addition to the valuable mines of iron ore and other minerals contained in and upon the real estate so owned

and possessed by your petitioner, certain of said real estate had by petitioner been improved by the building thereon of valuable structures of a permanent character, such as dwelling-houses, with kitchens and other necessary outhouses appurtenant thereto,
3 stables, stores, offices, blacksmith shops, sand-house, and hospital, furnished with all necessary furniture and equipments for the comfortable maintenance of the officers, agents, and employés of your petitioner engaged in carrying on the business of your petitioner at or near the towns, ports, or places above named, and, in addition to such improvements and their furniture and equipments, there were also at or near such towns, ports, or places large quantities of personal property belonging to petitioner and consisting in part of machinery of various sorts and kinds, tools for mining and general purposes, household stores and supplies in the company's houses and storehouses, locomotives and cars for the transportation of ores and the products thereof, horses, mules, cattle, and swine, a telephone line, with all its necessary instruments and appurtenances, medicines, clothing, and other articles of various sorts and kinds more particularly itemized as follows:

7 Rand slugger drills, at $75	$525.00	
6 Ingersoll drills, at $75	450.00	
One Diamond drill	850.00	
Furniture, house of R. R. supt. at Siboney	200.00	
Furniture, office of R. R. supt. at Siboney	50.00	
Furniture, company office at Siboney	150.00	
Saw-mill tools	600.00	
Machine shop and tools	1,500.00	
One bolt-cutting machine, 1½	500.00	
Foundry and tools	200.00	
Lagoon bridge at Siboney, damaged	1,200.00	
Locomotive # 9, damaged	900.00	
Locomotive # 13, "	350.00	
5 ore cars, 36" gauge, at $175	875.00	
3 flat cars, 36" gauge, at $300	900.00	
Furniture, company office at La Cruz.	75.00	
4 Books and stationery	600.00	
One volante and harness	175.00	
14 prs. car wheels on axles, at $24	336.00	
		$10,436.00
66 structures at or near Siboney, including dwelling-houses, outhouses, offices, hospital, and stables, together with their contents, dismantled, burned, or razed by order of the general commanding, all of the approximate value of		23,130.00
		$33,566.00

4. Your petitioner was in actual, peaceful possession of said property and was conducting itself as an American citizen, having maintained a strict neutrality with respect to the difficulties and troubles

then existing in said island of Cuba between the insurgents and the officers, agents, and troops of His Majesty the King of Spain, and having always so conducted itself, when, on or about the 1st day of June, A. D. 1898, and on various dates subsequent thereto, the properties of your said petitioner in said island of Cuba at or near the towns, ports, or places called "Siboney," "Firmeza," and "La Cruz" were, by direction of the commanding officers of the United States Army or of that portion thereof in such vicinity, entered upon by bodies of troops in the service of the Government of the United States, and petitioner's said properties were deliberately and by way of precaution taken possession of by said troops so acting, as aforesaid, and subsequently, by the deliberate command of such officers, many of said buildings belonging to your petitioner were used by said troops or were burned or otherwise destroyed, and said valuable property was also likewise used, burned, destroyed, embargoed, taken, appropriated, or carried away, whereby this petitioner sustained great damage in the sum of thirty-three thousand five hundred and
5 sixty-six ($33,566) dollars, as will more fully appear by reference to the itemized schedule of such damages above set forth.

5. All of said loss and damage so sustained by your petitioner was sustained as the result of the deliberate action and precautions taken and exercised by said bodies of troops acting under the directions of their commanding officers, and were not the results of warlike engagements or in the course of active hostilities, and as such taking of private property for public uses without just compensation is expressly prohibited by the Constitution and laws of the United States of America, said United States has thereby become indebted to your petitioner in the full sum of the aggregate value of the properties so used, carried away, burned, or destroyed.

Wherefore petitioner claims that there is justly due to it from the United States the sum of thirty-three thousand five hundred and sixty-six ($33,566) dollars, as set forth in the aforesaid schedule of damages.

6. That no assignment or transfer of said claim or any part thereof or interest therein has ever been made, and that your petitioner is justly entitled to the amount above stated after allowing all just credits and offsets.

Wherefore your petitioner prays judgment against the United States for the sum of thirty-three thousand five hundred and sixty-six ($33,566) dollars.

THE JURAGUA IRON COMPANY, LTD.,
By JOSIAH MONROE, *Secretary and Treasurer.*

6 STATE OF PENNSYLVANIA, *City of Philadelphia, ss:*

I, Josiah Monroe, being first duly sworn, do depose and say that I am the secretary and treasurer of The Juragua Iron Company, Ltd., a corporation, which corporation is named as party plaintiff in the annexed petition; that I have read the said petition and know the

contents thereof, and the facts therein stated are true to the best of my knowledge, information, and belief.

JOSIAH MONROE.

Subscribed and sworn to before me this 21st day of February, A. D. 1902.

WILLIAM J. DICKSON,
Notary Public.

[SEAL.]

Commission expires May 12, 1905.

7 II.—*Traverse. Filed January* 9, 1907.

In the Court of Claims of the United States, December Term, A. D. 1906.

No. 22804.

THE JURAGUA IRON COMPANY, LIMITED,
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

J. A. VAN ORSDEL,
Assistant Attorney General.

8 III.—*Argument and Submission of Case.*

This cause was argued by Mr. John S. Flannery and Mr. Frederic D. McKenney for the claimant and by Mr. Felix Brannigan for defendants and submitted January 9, 1907.

9 IV.—*Findings of Fact as Amended—Conclusion of Law—and Opinion of the Court.*

THE JURAGUA IRON COMPANY (LIMITED)
v.
THE UNITED STATES.

This case, having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The Juragua Iron Company (Limited) is a corporation duly created and existing under the laws of the State of Pennsylvania,

having its principal office and place of business in the city of Philadelphia, in that State, and is now, and for many years has been, engaged in the business of mining and selling iron ore and other mineral products in the United States, Cuba, and elsewhere, and in manufacturing iron and steel products, and was so engaged at the opening of the late war with Spain. To enable it to carry on said business, it owned, leased, and operated mines situate in the island of Cuba, and maintained offices, works, and the necessary tools, machinery, equipments, and supplies for said business, in the Province of Santiago de Cuba, at or near Siboney, Firmeza, and La Cruz. In addition to its mines, works, and their equipments, it also owned real estate at or near said city of Siboney, which was improved by 66 buildings of a permanent character, used for the purposes of its business and occupied as dwellings by its employees, and for other purposes.

II.

That in the year 1898, and while the war with Spain was in progress, the lives of the United States troops who were engaged in military operations in the Province of Santiago de Cuba, in the belligerent prosecution of the war, became endangered by the prevalence of yellow fever, and it was deemed necessary by the officers in command, in order to preserve the health of the troops and to prevent the spread of the disease, to destroy all places of occupation or habitation which might contain the fever germs. On or about the 11th day of July, 1898, General Miles, commanding the United States forces in the island of Cuba, because of the necessity aforesaid and by the advice of his medical staff, issued orders to his subordinate officers to destroy by fire these 66 buildings at Siboney, in the island of Cuba, which belonged to the claimant, and had been used for the purposes aforesaid; and pursuant to said order, said buildings and their contents were destroyed by fire by the military authorities of the United States; the reasonable value of which buildings at the time and place of destruction was $23,130; and the reasonable value of the drills, furniture, tools and other personal property so destroyed by fire under the order aforesaid was seven thousand nine hundred and eighty-six dollars ($7,986), making a total of thirty-one thousand one hundred and sixteen dollars ($31,116).

Conclusion of Law.

The court finds, as a conclusion of law, that the defendants are not liable for the payment of any sum to the claimant on account of the damage aforesaid and the petition is dismissed.

Opinion.

BARNEY, J., delivered the opinion of the court:

The claimant is a corporation organized and existing under the laws of Pennsylvania, having its principal office and place of doing

business in the city of Philadelphia. This corporation is now, and for several years has been, engaged in the business of mining and selling iron ore and its products, and in manufacturing iron and steel products, and was engaged in that business during the Spanish war. In furtherance of the business, it owned, leased, and operated mines in the island of Cuba, and maintained offices and manufacturing works in Cuba during such war; and also owned, in connection with such works, 66 buildings, which had been used as dwelling houses for the use and occupation of its employees, and as storehouses, offices, etc., in connection with the business of the claimant.

While the Spanish war was in progress, and on or about July 11, 1898, General Miles, then in command of the United States forces in Cuba, by the advice of the medical staff, ordered the destruc-
11 tion by fire of the 66 houses mentioned, to prevent the spread of the yellow fever then prevalent in that vicinity, by the destruction of the fever germs which were believed to be lurking therein. At the time of the destruction of these houses, troops of the United States were stationed near them, and they were burned for the purpose of preserving the health and lives of these troops. In connection with these houses, some furniture and tools belonging to the claimant were also incidentally destroyed by said fire. Also, about the same time, other personal property of the claimant was damaged by the necessary military operations of the United States troops.

This action is brought by the claimant to recover from the defendants a judgment for damages growing out of this destruction.

The first question to be considered in the determination of this case is the status of the property destroyed—*i. e.*, whether it is to be treated as "enemy property" or the property of a citizen of the United States. The law seems to be well settled that when a citizen of one belligerent country is doing business in the other belligerent country and has built up and purchased property there which has a permanent situs, such property is subject to the same treatment as property of the enemy. At first sight this rule of law seems to be a harsh one, but when we consider that the property therein situated is a part of the assets of a country, and in a certain sense a part of the country itself, and further consider the difficulty, in stress of war, of discriminating between enemy and citizen property situated in the same country, the rule seems to be reasonable and necessary.

"A foreigner living and established within the territory of a State is, to a large extent, under its control; he can not be made to serve it personally in war, but he contributes by way of payment of ordinary taxes to its support, and his property is liable, like that of subjects, to such extraordinary subsidies as the prosecution of a war may demand. His property being thus an element of strength to the State, it may reasonably be treated as hostile by an enemy." (Hall's International Law, 5th ed., 497.)

"Property is considered to be necessarily hostile by its origin when it consists in the produce of estates owned by a neutral in belligerent territory, although he may not be resident there. Land, it is held being fixed, is necessarily associated with the permanent interests of

the State to which it belongs, and its proprietor, so far from being able to impress his own character, if it happens to be neutral, upon it or its produce, is drawn by the intimacy of his association with property which can not be moved into identification in respect of it with its national character. The produce of such property therefore is liable to capture under all circumstances in which enemy's property can be seized." (Hall's International Law, 5th ed., 504.)

The same doctrine is laid down in Halleck's International Law, volume 1, 414-415, and in Taylor's International Law, 553, and has been recognized by the Supreme Court (Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191).

Assuming the property in question to be treated as "enemy property," we see no ground for the contention that the Government is liable for its destruction under the circumstances as stated; for, while the severities of war are being much ameliorated by recent treaties and international conferences, war, within certain limits, is and always will be destructive of the lives and property of the enemy.

12 Some of the circumstances under which the property of the enemy may be destroyed are stated by the same authority as follows:

"Finally, all devastation is permissible when really necessary for the preservation of the force committing it from destruction or surrender; it would even be impossible to deny to an invader the right to cut dikes of Holland to save himself from such a fate." (Hall's International Law, 5th Ed., 535; see also Taylor's International Law, 482-483.)

In the exigencies of war, the military forces of the United States were placed in a position where the lives of the soldiers were endangered by the prevalence of yellow fever, and the germs of this disease were believed to be lurking in the buildings, belonging to the claimant, near which these soldiers were necessarily encamped. The danger to health and life was imminent and seemed to call for heroic measures. It would not be contended that a belligerent would not have the right, under the most humane usages of modern warfare, to destroy the property of the enemy for the purpose of protecting its army from artillery or musket fire; and we can see no reason why it should not have the same right, if necessary for the protection of its army against the ravages of disease.

About the time of the destruction of these buildings other property belonging to the claimant was damaged as a necessary incident to the military operations of our troops. As to the want of liability of the defendants for such damage, it is hardly necessary to cite authorities, but reference is made to the above text-books at the pages as noted.

We have thus far considered this case upon the assumption that the property destroyed was "enemy property," but we believe that even if it is to be considered as the property of an American citizen, no cause of action is proven against the defendant.

That a belligerent is not liable for the necessary destruction of private property of a citizen caused by necessary military operations,

is also so well settled as hardly to need reference to authorities. This question arose in the case of Pacific Railroad *v.* United States (120 U. S., 227), and in deciding that case the court said: "The principle that, for injuries to or destruction of property in necessary military operations during the civil war, the Government is not responsible is thus considered established. Compensation has been made in several cases, it is true, but it has generally been, as stated by the President in his veto message, 'a matter of bounty rather than of strict legal right.'"

Hence, whether considering the property destroyed as "enemy property," or otherwise, we do not believe the claimant is entitled to recover, and the petition is dismissed.

BY THE COURT.

Filed January 28, 1907.

13 V.—*Judgment of the Court.*

No. 22804.

THE JURAGUA IRON COMPANY, LIMITED,
vs.
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 28th day of January, 1907, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree that the petition of the claimant, The Juragua Iron Company, be and the same is hereby dismissed.

BY THE COURT.

14 VI.—*Application for and Allowance of Appeal.*

No. 22804.

THE JURAGUA IRON COMPANY, LIMITED,
vs.
THE UNITED STATES.

Now comes the above named claimant, The Juragua Iron Company, Limited, by its attorneys of record, and from the judgment of this Court entered in the above cause on the 28th day of January, 1907 gives notice of and makes application for the allowance of an appeal to the Supreme Court of the United States.

McKENNEY & FLANNERY,
Attorneys for the Juragua Iron Company, Limited.

Filed March 4, 1907.

Ordered: That the above application for appeal be allowed as prayed for.

BY THE COURT.

March 4, 1907.

15 VII.—*Certificate.*

Court of Claims.

No. 22804.

THE JURAGUA IRON COMPANY, LIMITED,
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of pleadings in the above-entitled cause; of the findings of fact and conclusion of law and opinion filed by the Court; of the judgment of the Court dismissing the petition; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 7th day of March, 1907.

[Seal Court of Claims.]

JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

Endorsed on cover: File No. 20,602. Court of Claims. Term No. 637. The Juragua Iron Company, Limited, appellant, *vs.* The United States.. Filed March 8th, 1907. File No. 20,602.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 34.

THE JURAGUA IRON COMPANY, LIMITED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

The petitioner and appellant, The Juragua Iron Company, Limited, a corporation created and organized under the laws of the State of Pennsylvania, sued the United States, to recover upon an implied contract, upwards of $33,000, being the alleged value of certain permanent buildings, dwelling houses, offices, and the like, located near Siboney, in the Island of Cuba, which buildings together with their contents had been deliberately destroyed by fire, on or about July 11, 1898, pursuant to and by virtue of the official order of Major General Nelson A. Miles, commanding the United States military forces, then stationed in said Island. Such deliberate destruction of said buildings and contents was deemed a "military necessity" and was executed

with a view to preserving the health of said forces and to prevent the possible spread of yellow fever among them.

In its petition, filed in the court below, the company averred that it had been incorporated for the purpose among others, of purchasing and owing in the Island of Cuba lands containing iron ore and other minerals, and of mining said ores, and bringing the same to market in the United States and elsewhere, and also of owning all improvements, appliances, tools, machinery and supplies, necessary for the mining, manufacturing, transporting and vending of any of its property or products or convenient for purpose of enabling it to carry on its business to the best advantage; that in addition to valuable mines of iron ore, contained in and upon the real estate so owned by it, said real estate had been improved by certain permanent buildings, such as dwelling houses, stables, stores, offices, blacksmith shops, and hospital furnished with necessary furniture and equipment for the comfortable maintenance of its officers, agents, and employees engaged in carrying on its business; that while in the peaceful occupation of said property, having observed a strict neutrality with respect to the troubles then existing in said Island, said properties, by direction of the commanding officers of that portion of the United States army in such vicinity, "were deliberately and by way of precaution taken possession of by said troops" and subsequently, "by the deliberate command of such officers, many of said buildings * * * were burned or otherwise destroyed" whereby it sustained damages in the sum of $33,566 as per schedule set forth.

It was further averred that none of the damages so sustained resulted from "warlike engagements" or were inflicted "in the course of active hostilities," but were solely "the result of the deliberate action and precautions taken and exercised by said bodies of troops acting under the directions of their commanding officers," and "as such tak-

ing of private property for public use without just compensation is expressly prohibited by the constitution and laws of the United States," the latter thereby became indebted to the petitioner in the full sum of the damages by it so sustained. In opposition to this petition the United States filed the customary traverse and asked that the petition be dismissed.

Upon the proofs submitted the Court of Claims found the pertinent facts as follows, viz.:

I.

"The Juragua Iron Company (Limited) is a corporation duly created and existing under the laws of the State of Pennsylvania, having its principal office and place of business in the city of Philadelphia, in that State, and is now, and for many years has been, engaged in the business of mining and selling iron ore and other mineral products in the United States, Cuba, and elsewhere, and in manufacturing iron and steel products, and was so engaged at the opening of the late war with Spain. To enable it to carry on said business, it owned, leased, and operated mines situate in the island of Cuba, and maintained offices, works, and the necessary tools, machinery, equipments, and supplies for said business, in the Province of Santiago de Cuba, at or near Siboney, Firmeza, and La Cruz. In addition to its mines, works, and their equipments, it also owned real estate at or near said city of Siboney, which was improved by 66 buildings of a permanent character, used for the purposes of its business and occupied as dwellings by its employees, and for other purposes."

II.

"That in the year 1898, and while the war with Spain was in progress, the lives of the United States troops who were engaged in military operations in the Province of Santiago de Cuba, in the belligerent pros-

ecution of the war, became endangered by the prevalence of yellow fever, and it was deemed necessary by the officers in command, in order to preserve the health of the troops and to prevent the spread of the disease, to destroy all places of occupation or habitation which might contain the fever germs. On or about the 11th day of July, 1898, General Miles, commanding the United States forces in the island of Cuba, because of the necessity aforesaid and by the advice of his medical staff, issued orders to his subordinate officers to destroy by fire these 66 buildings at Siboney, in the island of Cuba, which belonged to the claimant, and had been used for the purposes aforesaid; and pursuant to said order, said buildings and their contents were destroyed by fire by the military authorities of the United States; the reasonable value of which buildings at the time and place of destruction was $23,130; and the reasonable value of the drills, furniture, tools and other personal property so destroyed by fire under the order aforesaid was seven thousand nine hundred and eighty-six dollars ($7,986), making a total of thirty-one thousand one hundred and sixteen dollars ($31,116)."

Upon such state of facts the Court of Claims concluded as matter of law that the defendants were not liable to the petitioner for the payment of any sum on account of the damages so sustained by it and adjudged that its petition be dismissed.

Assignment of Errors.

The Court of Claims erred in holding—

(1) That the property in question was "enemy property" and as such was liable to seizure and destruction by the military forces of the United States without obligation on the part of the United States to make reparation therefor;

(2) That even if appellant should be regarded in the light of a loyal citizen of the United States its property, by reason of its situation, was liable to seizure and destruction

by the military authorities of the United States, in case of "military necessity" without obligation on the part of the United States to make reparation therefor;

(3) The Court of Claims further erred in holding that such "military necessity" existed in fact, and that therefore claimant's petition should be dismissed.

Jurisdiction.

1. Of the Court of Claims.

2. Of the Supreme Court of the United States.

1.

The Court of Claims had jurisdiction to consider and adjudge this claim.

The claimant was a domestic corporation organized under the laws of the State of Pennsylvania. As such its right of access to the Court of Claims in connection with any claim against the United States cannot be gainsaid. If its claim as stated in its petition be well founded and within the limits of the jurisdictional powers conferred upon that court judgment should have been given in its favor.

The Court of Claims has jurisdiction to hear and determine any claim of a citizen of the United States, or of a domestic corporation, preferred against the United States, if it be "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States," provided it neither grows "out of the destruction or appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion" (R. S., U. S., 1059) nor—assuming that section 1066 of the Revised Stat-

utes was not repealed, as is sometimes contended, by the act of March 3, 1887 (24 Stats. L., 505)—grows out of nor is "dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

Assuming section 1066 of the Revised Statutes to be still in force it is to be noted that in order to bring such a claim within the prohibited class the connection between the treaty and the claim must be direct and proximate, that is "the *right itself*, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation" (United States *v.* Weld, 127 U. S., 51).

The act of March 3, 1887, ch. 359, "To provide for the bringing of suits against the United States," 24 Stats. L., 505, as amended by the act of June 27, 1898, ch. 503, § 1, 30 Stats. L., 494, was clearly intended to enlarge the jurisdiction of the Court of Claims and seemingly was intended to repeal the prohibition of section 1066 *supra*. Under this act the Court of Claims has jurisdiction to hear and determine "All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable," provided such claims do not grow out of the late civil war.

The property, the value of which is sought to be recovered in this action, was owned outright by the claimant. It was neither warlike nor contraband in character. It was being used in the furtherance of peaceful trade and commerce. It had been located where it was found by the military forces

of the United States in the furtherance of that "good correspondence" between the United States and Spain "and their citizens without exception of persons or places," which the treaty of 1795 between said high parties declared should be "firm and inviolable." It was deliberately burned by order of the Major General commanding the United States forces in the Island of Cuba, because "to preserve the health of the troops, and to prevent the spread of the disease" (yellow fever), and it was deemed necessary "to destroy all places of occupation or habitation which might contain the fever germs." No indemnity has at any time been paid to the claimants for the property so destroyed. At no time has the United States made claim of title to or denied the title of the claimant in said property. In the absence of circumstances constituting a good defense the law implies a promise to pay to the owner the reasonable value of the property so taken and destroyed.

Carpenter *v.* United States, 17 Wallace, 489.
United States *v.* Great Falls Mfg. Co., 112 U. S., 645.
Same *v.* Same, 124 U. S., 581.
Same *v.* Lynah, 188 U. S., 445.
Philippine Sugar Estates Dev. Co. *v.* United States, 39 Court of Claims, 225, 237.
Same *v.* Same, 40 Court of Claims, 33.

The jurisdiction of the Court of Claims to hear and determine this controversy would seem to be clear. It was not questioned by the United States in that court and probably will not be questioned here.

2.

As the amount in controversy exceeds three thousand dollars this court has jurisdiction to entertain the appeal filed herein (R. S. U. S., sec. 707).

Merits.

On April 25, 1898, the Congress of the United States of America enacted "An act declaring that war exists between the United States of America and the Kingdom of Spain," which act was approved by the President on the above date, and is in the following words, viz:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* First. That war be, and the same is hereby declared to exist, and that war has existed since the twenty-first day of April, Anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.
>
> "Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect."
>
> 30 Stat. L., Ch. 189, p. 364.

On April 20, 1898, the two Houses of the Congress passed Joint Resolution Number 24:

> "For the recognition of the independence of the people of Cuba, demanding that the government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect"

in the followings terms:

> "Whereas the abhorrent conditions which have existed for more than three years in the Island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a

disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and cannot longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited: therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled:* First. That the people of the Island of Cuba are, and of right out to be, free and independent.

"Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

"Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

"Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people."

Prior to April 21, 1898, there had been and, at least up to the moment of the enactment of the above declaration of war, there was in force certain articles of the treaty of Friendship, Limits and Navigation concluded between the United States of America and Spain on the 27th day of October, A. D. 1795, ratifications of which were exchanged April 25, 1796, and proclaimed August 2, 1796 (Treaties and Conventions, 1776-1887, p. 1006).

Said Treaty, among other things, declared that—

"ARTICLE I. There shall be a firm and inviolable peace and sincere friendship between His Catholic Majesty, his successors and subjects, and the United States and their citizens, without exception of persons or places."

"ARTICLE VI. Each party shall endeavor, by all means in their power, to protect and defend all vessels and other effects belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land, and shall use all their efforts to recover, and cause to be restored to the right owners, their vessels and effects which may have been taken from them within the extent of their said jurisdiction, whether they are at war or not with the Power whose subjects have taken possession of the said effects."

ARTICLE VII. "And it is agreed that the subjects or citizens of each of the contracting parties, their vessels or effects, shall not be liable to any embargo or detention on the part of the other, for any military expedition or other public or private purpose whatever;" * * *

ARTICLE XI. "The citizens and subjects of each party shall have power to dispose of their personal goods, within the jurisdiction of the other, by testament, donation, or otherwise, * * * and where, on the death of any person holding real estate within the territories of the one party, such real estate would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by being an alien, such subjects shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all rights of detraction on the part of the Government of the respective States."

ARTICLE XIII. "For the better promoting of commerce on both sides, it is agreed that if a war shall break out between the said two nations, one year after the proclamation of war shall be allowed to the merchants in the cities and towns where they shall live for collecting and transporting their goods and merchandises, and if anything be taken from them, or

any injury be done them within that term by either party, or the people or subjects of either, full satisfaction shall be made for the same by the government."

ARTICLE XVI. "This liberty of navigation and commerce shall extend to all kinds of merchandizes excepting those only which are distinguished by the name of contraband; * * * These merchandizes which follows shall not be reckoned among contraband or prohibited goods; That is to say * * * tin, iron, * * * coals, * * * and all other goods whatever, which have not been worked into the form of any instrument prepared for war, by land or by sea, shall not be reputed contraband, much less such as have been already wrought and made up for any other use;" * * *

The above articles were expressly confirmed by Article XII of the "Treaty of Amity, Settlement and Limits" concluded between the same high parties February 22, 1819, ratified and proclaimed February 22, 1821 (Treaties and Conventions, 1776-1887, pp. 1016, 1020).

Subsequently to 1863 and throughout all of the time of consequence in connection with this cause there was in force War Department General Orders No. 100, being the Instructions issued by the War Department of the United States of America for "the government of armies of the United States in the field, prepared by Francis Lieber, LLD., and revised by a Board of Officers of the United States Army."

Among such "Instructions" appear the following, which are pertinent here:

"Martial Law—Military Jurisdiction—Military Necessity—Retaliation.

"1. How Established.—A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or

occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest.

"The presence of a hostile army proclaims its martial law.

* * * * * * *

"4. Effects.—Martial law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military forces, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

* * * * * * *

"7. Martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

* * * * * * *

"10. Martial law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the army, its safety and the safety of its operations.

* * * * * * *

"1. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerent in time of peace, and avowedly intended to remain in force in case of war between the contracting parties.

* * * * * * *

"14. Military Necessity.—Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

"37. Private Property.—The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

"This rule does not interfere with the right of the victorious invader to tax the people or their country, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, land, boats or ships, and churches, for temporary and military uses.

"38. Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity, for the support or other benefit of the Army of the United States.

"If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity."

These instructions were issued, without modification, for the government of the armies of the United States during the war with Spain in 1898.

Davis, Elements of International Law, 3d ed., 1908, Appendix A, p. 505.

It was within the purview and under the protection of the public policy of the United States as thus expressed, and guaranteed that the claimant established certain of its works and properties upon and within the Island of Cuba, and was carrying on there the peaceful pursuits of commerce, when it was subjected to the seizure and destruction for which it now seeks reparation.

The burning of its houses, offices, etc., as set forth in the finding of fact numbered 2 occurred on or about July 11, 1898.

On July 18, 1898, the Adjutant General of the United States Army, Brigadier General H. C. Corbin, promulgated War Department General Orders No. 101 as follows:

"The following, received from the President of the United States, is published for the information and guidance of all concerned:

"EXECUTIVE MANSION,
"WASHINGTON, *July* 13, 1898.

"TO THE SECRETARY OF WAR.

"SIR: The capitulation of the Spanish forces in Santiago de Cuba and in the eastern part of the Province of Santiago, and the occupation of the territory by the forces of the United States, render it necessary to instruct the military commander of the United States as to the conduct which he is to observe during the military occupation.

"The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to announce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or by honest submission, coöperate with the United States in its efforts to give effect to this beneficent purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible."

* * * * * * *

"One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the

government of the country in its own right, and all arms, and supplies and other movable property of such government, may be seized by the military occupant and converted to his own use. The real property of the State he may hold and administer, at the same time enjoying the revenues thereof, but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways and boats belonging to the State may be appropriated to his use, but unless in case of military necessity they are not to be destroyed. All churches and buildings devoted to religious worship and to the arts and sciences, all school houses, are, so far as possible, to be protected, and all destruction or intentional defacement of such places, of historical monuments or archives, or of works of science or art, is prohibited, save when required by urgent military necessity.

"Private property, whether belonging to individuals or corporations, should be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained."

* * * * * * *

"Private property taken for the use of the Army is to be paid for, when possible, in cash at a fair valuation, and when payment in cash is not possible, receipts are to be given."

Whether the provisions of Article V of the amendments of the Constitution of the United States, to the effect that private property shall not "be taken for public use, without just compensation," is directly applicable in the facts of this case may possibly be questioned. In so far as the rights of citizens of the United States domiciled in Cuba are concerned, it might well be contended that under the circumstance above disclosed its protecting influence accompanied the army of the United States into that island. In determining

the rights of the parties to this cause this provision will at least be regarded as persuasive if not controlling.

It is stated in the findings of fact, and the statement is reiterated in the opinion of the Court of Claims, that in addition to being a Pennsylvania corporation the claimant had "its principal office and place of doing business in the city of Philadelphia;" that it was engaged in the business of mining and selling iron ore and in manufacturing iron and steel products, and was so engaged "at the opening of" and "during the Spanish war" (R., 5, 6); that in the furtherance of such business it maintained offices and manufacturing works in Cuba, and prior to July 11, 1898, owned, in connection with such works, the sixty-six (66) buildings which were used by its employees as dwelling houses, storehouses, and offices, and which on said date were burned by order of Major General Miles, then in command of the United States forces in Cuba, "to prevent the spread of the yellow fever then prevalent in that vicinity." It is not found or stated that these buildings were infected, nor does it appear that any case of yellow fever had ever been housed or cared for in one of them. The only finding on that subject is that, "in order to preserve the health of the troops and to prevent the spread of the disease," "it was deemed necessary" * * * "to destroy all places of occupation or habitation *which might contain the fever germs.*" It is further explained in the opinion that "at the time of the destruction of these houses, troops of the United States were stationed near them, and they were burned for the purpose of preserving the health and lives of these troops," it being further explained that, "In connection with these houses, some furniture and tools belonging to the claimant were also incidentally destroyed by said fire."

It is to be noted that the burning of these buildings did not take place in the course of any "military operation," such

as an attack or bombardment, nor as a preliminary thereto, nor was it done to destroy the cover of the enemy or to render his approach or retreat the more difficult. It does not appear that any body of the enemy troops was in the vicinity, and the court will so far take judicial cognizance of the history of the times as to recall that no collision between the troops of the United States and Spain occurred in the vicinity of Siboney or, indeed, anywhere else in Cuba after the landing of Major General Miles, commanding on that Island. At the time of this burning the United States forces held possession and were in the actual occupation of the country surrounding Siboney, including the property and its improvements here in question.

In this state of affairs, the learned court below declared that the status of the property destroyed, that is, whether it was "enemy property" or property of a citizen of the United States, was the first question to be considered in the determination of the case. It seems to have been the only question necessary for its determination for the court concludes that "whether considering the property destroyed as 'enemy property,' or otherwise, we do not believe the claimant is entitled to recover and the petition is dismissed" (R., 8).

In support of the assumption that the dwellings in question were "enemy property" and hence subject to destruction by the United States forces in the field, without liability to make compensation therefor, the learned court quotes somewhat freely from the works of learned writers on International Law and cites the opinion and judgment of this court in Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191.

In support of the conclusion that even if considered as the property of an American citizen no cause of action exists against the defendant that court cites the case of Pacific Railroad *v.* United States, 120 U. S., 227.

It is thought that the case at bar upon its facts is readily distinguishable from the cases cited, and that the expressions quoted from the learned publicists were not used in relation to any such condition of affairs as confronted the United States with respect to Cuba and its inhabitants during the war with Spain.

That war was not against Cuba nor against the Cuban people, nor against aliens domiciled or found within its borders and there engaged in the peaceful pursuits of commerce. It was a war solely against Spain, undertaken by the United States because of the "abhorrent conditions" which had been brought about in Cuba by Spain and which "could not longer be endured." It was undertaken by the United States in the interest of Cuba and on behalf of her peoples, and because those people were "and of right ought to be free and independent," and because it was the duty of the United States to demand "that the Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters."

It is not to be forgotten that at the very outset the United States formally disclaimed "any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof," nor that throughout the military operations in that island the United States troops had the active and friendly coöperation of the Cuban forces and people and "generously shared their scanty food with the 5,000 Cuban patriots in arms and the suffering people who had fled from" Santiago de Cuba (Report War Department, 1898, vol. 1, pt. 2, p. 28); nor that very early in the conflict an important expedition under Lieutenant-Colonel Dorst, U. S. V., had landed on the north coast of Cuba "a steamer load of the munitions of war most needed, including 7,500 rifles, 1,000,000 cartridges, 5,000 uniforms, and other material needed by the 10,000 Cubans under General Garcia" (*ibid,* p. 11); nor that the Congress of the

United States, on May 18, 1898, authorized the President and general officers commanding troops in Cuba "to furnish to the Cuban people such arms, ammunition, equipments, and military stores and supplies as they may require to increase the effective fighting force in the existing war against Spain" (30 Stats. L., 419), and also made appropriations for the relief of the destitute Americans, as well as destitute Cubans who were inhabitants of the island (30 Stats. L., 220, 419, 1069).

See Neely *v.* Henkel, 180 U. S., 109.

But even if this were not all so, and if the mere situs of the claimants' property within the territorial sovereignty of the enemy stamped it as "enemy property," nevertheless, under well-recognized principles of modern international law, as well as under the modern military law governing the armies of the United States in the field, and binding as well upon the Government as upon those who become subject to its power, the Juraqua Iron Company became and is entitled to compensation for its property so seized and destroyed.

Article 38, sec. 11, General Orders No. 100, *supra.*

General Orders No. 101, *supra.*

General Orders No. 101, promulgated through the War Department by President McKinley, did not announce any new principle either of law or liability. It merely reiterated certain well understood principles of international law, founded in equity and moral right and accepted and acted upon by all civilized nations. It was scarcely more than a reiteration in condensed form, of Lieber's instructions, as proclaimed by direction of President Lincoln in 1863 in General Orders No. 100; afterwards adopted by the United German Empire for the government and regulation of its armies; formulated into a code by Bluntschli; made the basis of the Brussels agreement of 1879; adopted by The Hague convention of 1899 and latterly reannounced, practically in its original form in The Hague convention of 1907 "with re-

spect to the laws and customs of war on land," to the last two of which conventions the United States has formally indicated their adherence.

> "International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.
>
> "The most certain guide, no doubt, for the decision of such questions is a treaty or statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations."

Mr. Justice Gray, speaking for this court in Hilton *v.* Guyot, 159 U. S., 113, 163, and citing Fremont *v.* United States, 17 How., 542, 557; *The Scotia,* 14 Wall., 170, 188; Respublica *v.* De Longchamps, 1 Dall., 111, 116; Moultrie *v.* Hunt, 23 N. Y., 394, 396.

Again it has been said that—

> "International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where

there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but trustworthy evidence of what the law really is (Hilton *v.* Guyot, 159 U. S., 113, 163, 164, 214, 215).

"Wheaton places, among the principal sources of international law, 'Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.' As to these he forcibly observes: 'Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles' (Wheaton's International Law, 8th ed., § 15).

"Chancellor Kent says: 'In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law' (1 Kent Com., 18)."

The Paquete Habana, 175 U. S., 677, 700-701.

What in practice is to be the fair interpretation of the declarations, so oft repeated, that private property "whether belonging to individuals or corporations, is to be respected" and "unless forfeited by crimes or by offenses of the owner" is to "be seized only by way of military necessity" and can "be confiscated only for cause," and "private property taken for the use of the army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible, receipts are to be given."

For what purpose are the receipts to be given except as evidence of the taking and of the obligation and agreement to pay?

In the case at bar, for some reason not explained, no receipts appear to have been given.

The obligation of a belligerent to pay for private property taken or destroyed under circumstances not involving actual military operations—that is, in battle, or the course of bombardment, and the like—is recognized and declared by practically all text-writers who have treated of the subject.

Chancellor Kent, in his Commentaries, says (pp. 92-93):

> "The general usage now is not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for a capitulation. Contributions are sometimes levied upon a conquered country, in lieu of confiscation of property, and as some indemnity for the expenses of maintaining order and affording protection. If the conqueror goes beyond these limits wantonly, or when it is not clearly indispensable to the just purposes of war, and seizes private property of pacific persons for the sake of gain, and destroys private dwellings, or public edifices devoted to civil purposes only, or makes war upon monuments of art and models of taste, he violates the modern usages of

war, and is sure to meet with indignant resentment, and to be held up to the general scorn and detestation of the world."

Hall, in his treatise on International Law, says:

"Of the private property found by a belligerent within the territory of his enemy, property in land and houses, including property in them held by others than their absolute owners, was very early regarded as exempt from appropriation * * * personal property remained exposed to appropriation by an enemy; and so late as the seventeenth century, armies lived wholly upon the countries which they invaded, and swept away what they could not eat by the exercise of indiscriminate pillage. But gradually the harshness of usage was softened, partly from an increase of humane feeling, partly for the selfish advantage of belligerents, who saw that the efficiency of their soldiers was diminished by the looseness of discipline inseparable from marauding habits, and who found, when war became systematic, that their own operations were embarrassed in countries of which the resources were destroyed. A custom grew of allowing the inhabitants of a district to buy immunity from plunder by the payment of a sum of money agreed upon between them and the invader, and by furnishing him with specified quantities of articles required for the use of his army; and this custom has since hardened into a definite usage, so that the seizure of movables or other personal property in its bare form, has, except in a very few cases, become illegal" (pp. 441, 442).

Even if the real property belongs absolutely to one of the belligerent States it cannot rightly or legally be devastated by the forces of the other.

"An occupant may, however, seize the profits accruing from the real property of the State and may make what temporary use he can of the latter, subject it would seem to the proviso that he must not be guilty of waste or devastation. Thus he can use

buildings to quarter his troops and for his administrative services, he receives rents, he can let lands or buildings and make other contracts with reference to them, which are good for such time as he is in occupation, and he may cut timber in the State forests; but in cutting timber, for example, apart from the local necessities of war, he must conform to the forest regulations of the country, or at least he must not fell in a destructive manner so as to diminish the future annual productiveness of the forests."

Hall's International Law, 437, 438.

Halleck states the modern rule as follows:

"The general theory of war is, as heretofore stated, that all private property may be taken by the conqueror and such was the ancient practice. But the modern usage is not, to touch private property on land, without making compensation, except in certain specified cases. These exceptions may be stated under three general heads: (1) Confiscations or seizures by way of penalty for military offenses; (2) Forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order, and affording protection to the conquered inhabitants; and (3) Property taken on the field of battle, or in storming a fortress or town."

2 Halleck's International Law, 68.

"Private property on land is now, as a general rule of war, exempt from seizure or confiscation; and this general exemption extends even to cases of absolute and unqualified conquest."

Id., 67.

"The effect of war upon enemy's property was formerly the same on both land and sea. In former times, enemy's property, property of the subject and the State alike, when taken either upon land or sea, became the prize of the captor. This has been changed by the forces of advancing civilization. Private property on land, not directly fitted or used for warlike purposes, is not, as a general rule, subject to seizure and confiscation by the belligerents. *It*

can sometimes be taken, used or destroyed for the purpose of subserving an overruling and pressing military necessity. The taking, use, or destruction in that case is justified by necessity, but it must be a strict one. But never now as in times past, except in cases of such necessity, can an enemy who invades a foreign country lawfully spread out his parties of devastors and take the private property of non-combatants. It is as sacred as if no war existed. But upon the sea it is different. The usages of the ocean lag far behind the usages of the land in becoming amenable to the processes of civilization."

Treatise on International Law, by Cushman K. Davis, 144, 145, 146.

From the date of the promulgation of Dr. Lieber's Instructions, in 1863, in the form of War Department General Orders No. 100, to the present date, as lately evidenced by the signing on its behalf of the "Convention respecting the laws and customs of war on land" (Hague Conference, 1907), the United States has steadily adhered to the position that even in the territory of a hostile State "private property, as well as religious convictions and practices, must be respected," and "private property cannot be confiscated." The fact that we are not able to point to controlling judicial precedents is of small consequence, for the fact that no case has heretofore arisen for adjudication under the principle of law here contended for does not militate against its existence or its strength. So far as the United States is concerned, no occasion for the application of the rule or principle occurred between the close of the Civil War and the 20th of April, 1898. In so far as cases which arose during the Civil War are concerned, the jurisdiction of the Court of Claims was restricted, but the obligation of a belligerent to pay in proper cases has been recognized as a living, vital principle in several adjudicated cases of high authority.

As was said in an able dissenting opinion recently filed in the Spanish Treaty Claims Commission (The Juragua

Iron Co., Ltd., *v.* United States, Commissioner Maury dissenting):

"The law of war has undergone many changes since the time when captives were put to the sword or sent into slavery, and these changes have resulted necessarily from the intellectual and moral growth of the world.

"As an illustration of the silent but irresistible march of this improvement it may be recalled that a little more than a century ago, during our revolutionary struggle with Great Britain, several of the States resorted, as a war measure, to the confiscation or sequestration of debts owing by their citizens to British subjects, a course of conduct which if practiced at this day would, it is needless to add, bring down on the offending nation general reprehension, with a loss of financial standing.

"The case now before us presents for consideration the interesting inquiry whether we have not reached a period in the world's history when it is equally reprehensible for a belligerent to lay violent hands on the tangible personal effects of a citizen of the enemy country happening to be within his territory at the commencement of hostilities.

"Nearly a century ago the Supreme Court of the United States gave a negative answer to a similar inquiry in the case of *Brown v. United States* (8 Cr., 110). Without presuming to question the soundness of that case at the time it was decided, it is worthy of remark that it has been thought that the mind of the Chief Justice who delivered the opinion of the court might have been still under the influence of the powerful reasoning he had employed at the bar in defending the validity of the sequestration of British debts in *Ware v. Hilton* (3 Dall., 199). Indeed, I may say that *Brown v. United States* has not been quite free from criticism in the eminent tribunal itself that decided it. Mr. Justice Field, in his able dissenting opinion in *Miller v. United States* (11 Wall., 268), after quoting from the opinion of the Chief Justice, makes the following comment:

> "'The language of the eminent Chief Justice is perhaps subject to some qualification, if it was intended to state as a rule of public law that all property of the enemy, whether on land or water, was subject to confiscation. Mr. Wheaton, who is authority on all questions of public law, says that by the modern usage of nations, which has acquired the force of law, "private property on land is exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory," and that "this exemption extends even to the case of an absolute and unqualified conquest of the enemy's country"' (p. 317).

"The learned justice then proceeds by way of contrast to make the following quotation from the opinion of the Chief Justice in *United States v. Percheman* (7 Pet., 51), delivered nineteen years afterwards:

> "It is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, *which has become law*, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled" (p. 87).

"The difference in tone between the two cases leaves the impression that the chief justice had either receded from what Justice Field termed *'the severe rule'* laid down in the earlier case, or that international law had undergone a notable change at the time the later case was decided.

"As it transcends the power of any single nation to arrest the development of the law of nations, it is obvious that the decision in *Brown v. United States*, made nearly a century ago, ought not to preclude this Commission from inquiring for itself whether the Powers have since agreed on a rule dif-

ferent from that laid down in the case mentioned, for if they have, that rule must be followed.

"Let us turn now to the accredited writers on international law for light on the question whether nonhostile enemy property is exempt from seizure or confiscation by a belligerent when found in his territory on the breaking out of war.

"The encomium passed on Calvo by Mr. Justice Gray, that 'no international jurist of the present day has a wider or more deserved reputation' (*The Paquette Habana*, 175 U. S., 677, 703), justifies my placing him at the head of the list of authorities I shall consult.

"Looking at sovereignty in the abstract, we readily arrive at what Calvo terms 'the barbarous but logical inference' that a nation can confiscate all enemy property found within its territory at the outbreak of war. But turning aside from this abstract view, the publicist lays down that '*as a matter of fact*, in our day the property of enemies found in the territory of a belligerent State at the breaking out of war is exempted from confiscation and considered as entitled to immunity from the application of the laws of war.' This I take from the fifth and last edition (1896) of Calvo's great work on international law. (Tome 4, § 1915, p. 54.)

"In the same year appeared the '*Principes du Droit des Gens*' of the learned publicist, Rivier. According to him it is a principle accepted by the states that compose the family of nations that private property is *inviolable* in land warfare. (*La propriété privée est inviolable...Tel est le principe aujourd'hui reconnu, entre les États de la société des nations, dans la querre sur terre.* Tome 2, p. 318.)

"In another place the author states that the belligerent who should, at this day, confiscate *the property or credits* of the enemy country or its citizens would provoke disastrous retorsion or reprisal. *Ibidem*, Tome 2, p. 232.)

"Heffter, in his work entitled 'International Law of Europe,' lays down that the old principle that a belligerent could appropriate as booty enemy property in his territory has no place in the more humane code of our day.

"The number of editions this work went through in German and French, to say nothing of one in Greek and another in Polish, bespeaks the estimation in which it has been held.

"I have before me the last French edition enriched by notes from the pen of the learned Professor Geffcken. Following Heffter, he says:

> 'The respect for enemy property situated within the jurisdiction of the adverse party is a consequence of the principle generally observed at the present time which allows enemy subjects domiciled in the territory of the belligerent to continue to reside there so long as they conduct themselves properly."

"The professor in one of these notes indulges in quite a free criticism of the Supreme Court of the United States for what he terms its violation of the principle of immunity by sustaining the policy of the Government during our civil war in seizing cotton as a war measure in the hands of non-hostile owners in the insurgent territory. The court, on the other hand, in a series of cases places its approval of that policy on the distinct ground that as the life of the Confederacy depended as much on cotton as on men the product had thereby become contraband of war and so removed outside of the protection of the principle in question.

"It is important to note, as bearing strongly on the case before us, that each of these views furnishes conclusive evidence that the law of nations not only requires a belligerent to protect innocent enemy property found in his domain at the commencement of war, but also to extend the same protection to such property when invading the territory of the other belligerent.

In the *United States v. Padelford* (9 Wall., 531, 540) the Chief Justice said:

> " 'In the case of *Mrs. Alexander's Cotton*, it was determined that cotton, though private property, was a proper subject of capture by the national forces, during the recent civil war. The court regarded this

particular species of property as excepted, by its peculiar character and by circumstances, *from the general rule of international law which condemns the seizure of the property of private persons not engaged in actual hostilities, though residing in a hostile territory or region.*' (Italics my own.)

"In *United States v. Klein* (13 Wall., 137), another case involving a cotton seizure, the same eminent judge said: '*The Government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt private property of noncombatant enemies from capture as booty of war.*' (Italics my own.)

"Manifestly these two cases show that the Supreme Court no longer regards "the severe rule" laid down in *Brown v. United States* as holding a place in the Law of Nations.

"To these testimonies I will add that of Doctor Oppenheim, the author of a work on international law published in London in 1905. He says:

> "'In former times all private and public enemy property, immovable or movable, on each other's territory could be confiscated by the belligerents at the outbreak of war, as could also enemy debts; and the treaties concluded between many states with regard to the withdrawal of each other's subjects at the outbreak of war stipulated likewise the unrestrained withdrawal of the private property of their subjects. Through the influence of such treaties, as well as of municipal laws and decrees enacting the same, an international usage and practice grew up that belligerents should neither confiscate private enemy property nor annul enemy debts in their territory. The last case of confiscation of private property is that of 1793, at the outbreak of war between France and Great Britain. No case of confiscation has occurred during the nineteenth century, and although several writers maintain that according to strict law the old rule, in contradistinction to the usage which they do not deny, is still valid, it may safely be maintained that it is obsolete, and that there is now a customary rule of international law in existence prohibiting the confiscation of private

enemy property and the annulment of enemy debts on the territory of a belligerent. Accordingly, the embargo of enemy ships in the harbors of the belligerents at the outbreak of war is no longer made use of, and a reasonable time is granted to them to leave those harbors. On the other hand, this rule does not prevent a belligerent from suspending the payment of enemy debts till after the war for the purpose of prohibiting the increase of enemy resources; from seizing public enemy property on his territory, such as funds, ammunition, provisions, and other valuables; and from preventing the withdrawal of private enemy property which may be made use of by the enemy for military operations, such as arms and munitions. And it may be expected in the future that those enemy mail boats which were built from special designs for the purpose of quickly turning them into cruisers of the navy will be prevented from leaving the ports of a belligerent at the outbreak of war. (Vol. 2, § 102, pp. 111, 112.)'"

In Mitchell *v.* Harmony (13 Howard, 115), which involved an action by Harmony, a native of Spain and an army trader, against Mitchell, an officer of the United States army, to recover damages for trespass in the alleged wrongful seizure, in Mexico, of his goods, it was said (Taney, Chief Justice, speaking for the court):

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the Government is bound to make full compensation to the owner; but the officer is not a trespasser.

"But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible

> to define the particular circumstance of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

The verdict and judgment in favor of the plaintiff Harmony were sustained, the court indicating that the fact that the trespass occurred beyond the limits of the United States did not militate against the jurisdiction of the trial court, citing McKenna *v.* Fisk, 1 Howard, 241, as authority upon that point.

United States *v.* Russell, 13 Wallace, 623, came before this court on appeal from the Court of Claims. There three steamboats, owned by Russell, during the war of the Rebellion were used under military orders in the public service, as transports. Certain payments for the service were made in each case by the Government to Russell, but he claimed a larger sum, which being refused he instituted suit to recover.

Mr. Justice Clifford speaking for the Court and citing Mitchell *v.* Harmony *ubi supra,* said:

> "Private property, the Constitution provides, shall not be taken for public use without just compensation and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the Government to deprive the owner of his property without his consent." * * *
>
> "Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and

appropriated to the public use, or may even be destroyed without the consent of the owner."

* * * * * * *

"Where such extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the Government is ample to supply for the moment the public wants, * * * but the public danger must be immediate, imminent and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay, * * * it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified."

"Such a justification may be shown, and when shown, the rule is well settled * * * that the Government is bound to make full compensation to the owner." * * *

"Such a taking of private property by the Government when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the Government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the Government must make full restitution for the sacrifice" (p. 629).

* * * * * *

The case of the United States *vs.* Pacific Railroad Company, 120 U. S., 227, strongly relied upon by the learned court below, involved cross appeals from the judgment of the Court of Claims, and grew out of an action by the railroad company to recover from the United States certain freights due for services rendered. The defendant admitted

a balance to be due from it on such account, unless they were entitled to offset the cost of certain labor and materials alleged to have been furnished during the war of the rebellion, and used in the reconstruction of certain bridges on the line of the company. The bridges in question had been destroyed under instructions of General Rosecrans, commanding the Federal forces in Missouri, to "use every means * * * to prevent the advance of the enemy." The court found that the exigency "was of the gravest character," and that the destruction ordered was "an imperative military necessity."

This court, in disposing of the case, speaking through Mr. Justice Field, said:

> "The injury and destruction of private property caused by their (the armies) operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government. By the well settled doctrines of public law it was not responsible for them."

But the learned Justice immediately proceeded to draw a distinction between the destruction of or injury to private property caused by battle or bombardment or with a view to impeding the advance of the enemy, that is to say, losses which the belligerent occasions "not wilfully, but through necessity and mere accident," and such as result from acts done by the belligerent "deliberately and by way of precaution," clearly indicating that in the latter case the obligation of the State to compensate the owner is imperative. In support of this distinction the learned Justice said:

> "Vattel, in his Law of Nations, speaks of damages sustained by individuals in war as of two kinds—those done by the State and those done by the enemy. And after mentioning those done by the State deliberately, and by way of precaution, as when a field, a house, or a garden belonging to a private person

is taken for the purpose of erecting on the spot a town rampart or other piece of fortification; or when his standing corn or his storehouses are destroyed to prevent their being of use to the enemy; and stating that such damages are to be made good to the individual, who should bear only his quota of the loss, he says: 'But there are other damages, caused by inevitable necessity, as for instance, the destruction caused by the artillery in retaking a town from the enemy. These are merely accidents; they are misfortunes which chance deals out to the proprietors on whom they happen to fall. The sovereign, indeed, ought to show an equitable regard for the sufferers, if the situation of his affairs will admit of it; but *no action* lies against the State for misfortunes of this nature—for losses which she has occasioned, not willfully, but through necessity and by mere accident in the exertion of her rights. The same may be said of damages caused by the enemy. All the subjects are exposed to such damages, and woe to him on whom they fall! The members of a society may well encounter such risk of property, since they encounter a similar risk of life itself. Were the State strictly to indemnify all those whose property is injured in this manner, the public finances would soon be exhausted, and every individual in the State would be obliged to contribute his share in due proportion, a thing utterly impracticable." (Book III, c. 15, sec. 232.)

And, citing Mitchell *v.* Harmony, *ubi supra,* laid down the following rule, which would seem to be decisive of the case at bar:

"In what we have said as to the exemption of the Government from liability for private property injured or destroyed during war by the operations of armies in the field or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses

and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the Government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause."

The case of Putegnat Heirs, before the Mexican Claims Commission in 1871 (4 Moore's International Arbitrations, 3718), in many of its features was similar to the case at bar. Commissioner Wadsworth, in delivering the opinion of the tribunal awarding the value of the goods destroyed and interest thereon, said:

"General Avalos, commanding at Matamoras, in the service of the Mexican government, during the siege of that place in October, 1851, by Caravajal, seized the storehouse in which Putegnat's goods were on sale at the time, turned the storehouse into a fortification, from whence to resist and annoy the enemy, and forbade the removal of the goods to a place of safety. In the course of the contest the house was set on fire by the shells of the enemy and was destroyed.

"In determining whether there is a liability in this case on the part of the government of Mexico to pay the value of the goods thus destroyed by the enemy, I shall proceed upon the conclusion, which I draw from the facts in the case, that the goods were lost because of the seizure of the house and the order forbidding their removal. I shall treat the case as a seizure of the house and goods by General Avalos for the public service, and their destruction by the enemy as a necessary consequence of the nature of the service to which, for the public benefit, the goods were subjected. I shall assume that if the government would be liable for the house destroyed by the enemy's fire, it would be liable for the goods also, perhaps much more so, as they might have been removed to a place

of safety in a few minutes, since the quantity was not large.

"I conceive that the government of Mexico is not liable for property destroyed by the enemy during the siege of a town without any complicity on its part, nor for property necessarily and incidentally destroyed by the government in its fire upon an enemy. To make the government responsible, the property must be taken by its authority to be used against the enemy (to assist an attack or make good a defense, for instance) or destroyed or carried away to prevent the enemy from using it. This is what Vattel calls taking deliberately or by way of precaution. 'As when a field, a house, or a garden, belonging to a private person is taken for the purpose of erecting on the spot a town rampart or any other piece of fortification, or when his standing corn or storehouses are destroyed to prevent their being of use to the enemy, such damages are to be made good to the individual, who should bear only his quota of the loss.' (Book 3, c. 15, p. 402; see, also, Grotius, Book 3, c. 20, sec. 7.) Property taken or destroyed for public use lawfully by the civil or military authorities must be paid for by the Government."

Citing—

Mitchell *vs.* Harmony, 13 How., 115.
Hale *vs.* Lawrence, 3 Zabriskie, 728.
Grant *vs.* U. S., 1 C. Cls., 41.

In the case of *Grant vs. U. S.* (1 C. Cls., 41), which was a claim for the value of private property, consisting of mills, dwelling-houses, storehouses, etc., destroyed and abandoned in Arizona by order of the commander of the United States forces in 1861, the Court of Claims carefully reviews the law governing such claims, quoting with approval passages from Vattel, Grotius, and *Mitchell vs. Harmony*, above referred to, and concludes with the following clear and concise statement of the law as gathered from the authorities and text-writers:

"The authorities cited are direct and emphatic, and are supported by every writter of respectability upon

public and national law. It may safely be assumed as the settled and fundamental law of Christian and civilized States that governments are bound to make just indemnity to the citizen or subject whenever private property is taken for the public good, convenience, or *safety*" (p. 44).

In the case of the *United States v. Lynah* (188 U. S., 445) many of the foregoing authorities are reviewed, and the law governing the appropriation of private property for governmental use is distinctly and clearly set forth as follows:

"The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the Government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary, and a governmental, right. When the Government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the Government takes possession of property under the claim that it belongs to the Government (when in fact it does not), that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the Government to pay for that which it claims to own. Very different from this proprietary right of the Government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of Government. The right of eminent domain underlies all such rights of property. The Government may take personal or real property whenever its necessities, or the exigencies of the occasion, demand. So, the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the 5th amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation."

* * * * * * *

"Whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

* * * * * *

"That which the officers did is admitted by the answer to have been done by authority of the Government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the Government did, acting under its direction, resulted in an appropriation, it is to be treated as the act of the Government."

Citing South Carolina *vs.* Georgia, 93 U. S., 4; Wisconsin *vs.* Duluth, 96 U. S., 379; U. S. *vs.* Great Falls Mfg. Co., 112 U. S., 645.

* * * * * * *

"But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the Government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th amendment of paying just compensation."

The right of the Juragua Iron Company to compensation for property taken and appropriated deliberately and as a precautionary measure to prevent the spread of disease among the troops of the United States would seem to be as meritorious as the claim of a citizen whose ships were used to transport troops, or whose supplies and provisions were taken to feed and clothe them, or whose medicines were made use of to cure their bodily ills.

The case at bar is not a case such as *Langford v. United States* (101 U. S., 341, 346), where an officer of the United States took and held possession of the land of a private citizen under a claim that it belonged to the Government; nor is it an action to recover for the use and occupation of real

estate, which requires a contractual relation to support it (Hill *v.* United States, 149 U. S., 593, 598); nor is it an action to recover damages for a tort committed by General Miles, for which he and not the United States would be responsible (Schillinger *v.* United States, 155 U. S., 163); but it is an action to recover compensation for the appropriation of the private property of an individual citizen by the Government exercising the right of eminent domain from which arose an implied contract on the part of the Government to make good the loss thereby inflicted.

It ought not to be successfully contended that such an appropriation and destruction of property as is involved in this case does not imply an obligation on the part of the Government to reimburse the owner *pro tanto* for the sacrifice. The property destroyed was non-military and non-contraband in character. It did not lie in the pathway of hostilities. It was not involved in any military operation, either present or prospective. It was not destroyed in the course of a bombardment nor of an attack, nor was it destroyed to harass or embarrass the enemy nor to prevent it from falling into his hands or of affording him comfort or subsistence. It was the property of a loyal citizen of the United States, placed where it was found in the furtherance of the trade and commerce of the United States, and in furtherance of the public policy of the United States as expressed in its ancient treaties with Spain. It was neither wantonly nor tortiously destroyed by the military officer in charge of operations in its vicinity, but it was coolly and deliberately appropriated and destroyed for the general benefit that such action might have upon the health of the troops under his command. In so far as compensation for the loss inflicted is concerned, the case would seem to fall within the principle illustrated by the deliberate and precautionary taking from its private owner of a house or a garden and the erecting thereon of a town rampart or other piece of fortification, in which case all agree that the damages

suffered should be made good to the individual, who should only be required to bear his quota of the loss.

It is respectfully submitted that the judgment of the Court of Claims should be reversed and the case remanded to that court, with an instruction to enter judgment upon the findings of fact in favor of the claimant for the sum of $31,116.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
WILLIAM HITZ,
Attorneys for Appellant.

WAYNE MACVEAGH,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE JURAGUA IRON COMPANY, LIMITED, appellant, v. THE UNITED STATES. } No. 34.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The Juragua Iron Company, Limited, is a corporation organized under and by virtue of the laws of the State of Pennsylvania, having its principal office and place of business in the city of Philadelphia in that State. Appellant company is now and for many years has been engaged in the business of manufacturing iron and steel products and in mining and selling iron ore and other minerals in the United States, Cuba, and elsewhere. In its operations and in the furthering of its manufacturing and commercial interests it owned, leased, and operated mines in the island of Cuba and maintained offices, works, and the necessary tools, machinery, and equipments incident thereto in the province of Santiago de Cuba, Siboney, Firmeza, and La Cruz. In connection with

its said business appellant company owned real estate near the said city of Siboney, Cuba, including certain buildings of a permanent character situated thereon, which buildings were used in connection with its said operations and were also occupied as dwellings by its employees and for other purposes.

In the spring of 1898 the United States Government landed large bodies of troops in the island of Cuba for military operations in the prosecution of the war with Spain. At that time, and while the United States troops were engaged in active military operations in the province of Santiago de Cuba in the belligerent prosecution of the war, yellow fever was so prevalent and deadly in its effects that the lives of the American troops became endangered, and in order to preserve the health and lives of the American forces and to prevent the spread of the disease it became necessary to destroy all places of occupation or habitation which contained the fever germs.

On or about the 11th day of July, 1898, General Miles, commanding the United States forces in the island of Cuba, having been advised by his medical staff of the necessity for the destruction of all places harboring the fever germs, issued orders to his subordinate officers to destroy the buildings heretofore described, which were owned by appellant company. Pursuant to said orders the buildings and the contents thereof, consisting of furniture, tools, and other personal property, were destroyed by fire, the total value thereof at that time being $31,116.

Petition was filed in the Court of Claims by appellant company seeking to recover the foregoing amount from the United States, and on the issues joined the court entered judgment, ordering, judging, and decreeing that the petition be dismissed. Thereupon appeal was taken to this court.

THE ISSUES.

At the time this brief goes to print government counsel has not been served with a copy of appellant's brief.

It was contended in the court below that from the act complained of there arose an implied contract for payment on the part of the Government. That—

> Even if no contract could be implied from the action of General Miles, this court under the first section of the Tucker Act of March 3, 1887, would have power to assess and award the amount of the damages sustained by the claimant by the taking and destruction of its property, such appropriation not having been tortious. (Claimant's brief in court below, p. 66.)

It was further contended that General Orders, No. 101, A. G. O., to which reference is hereafter made, shows the intention and desire of the Government of the United States to make compensation for property seized and destroyed by the United States forces. This claim is made by reason of that portion of said orders which reads as follows:

> Private property taken for the use of the Army is to be paid for when possible in cash at

a fair valuation, and when payment in cash is not possible, receipts are to be given. (Claimant's brief, p. 69.)

It is the Government's contention that:

All property having its situs where international warfare is being waged is subject to seizure and destruction by the invading army when such action is necessary for the preservation, welfare, and safety of the force committing the destruction, regardless as to the domicile of the owner or his allegiance and loyalty to the country from which the invading party is sent forth.

Under the facts as found in this case, appellant company had its constructive or mercantile domicile in Spanish territory, and its property situate in such territory was impressed with enemy character, and as such was subject to seizure and destruction by the invading army under stress of military necessity.

Furthermore, eliminating the question of the right of the United States to seize or destroy the property in issue, the act complained of becomes simply a wrong committed on the part of the agents of the United States, and therefore the case is one sounding in tort, and appellant company can not recover.

That General Orders, No. 101, afford no basis whereby the claimant is entitled to recover, and that the orders did not change the rules of international warfare.

Furthermore, the President had not the power nor authority, without being specially authorized by

Congress, to create an obligation which is not recognized by law.

Military necessity may arise from many causes:

The liability of the property falling into the hands of the enemy and thus aiding the defense or impeding the progress of the invading forces.

The hindrance or obstacles that the property may present to the advancement of the invading army, either as to its character or its condition.

The harboring within the premises of enemies to the invading forces.

The existence of the germs of contagious, infectious, and deadly diseases within the property or its surroundings, endangering the lives of the invaders.

In fact, any condition attaching to the property that would impede, delay, or embarrass the invading army or endanger the lives and health of its soldiers in active warfare when prosecuting an international war, occasions a military necessity, and when such exists the right of destruction on the part of the invaders is recognized in the well-known rules of international law.

ARGUMENT.

The property destroyed was located in enemy territory and therefore subject to all the rules applicable to international warfare. These rules, practically forming a code of international law, have become fairly well defined and understood, and they are the result of the impress made by Christian civilization upon the nations of the world. Their

justness and fairness are recognized in contradistinction to that brutalizing warfare whereby the "Victor conquered but to slay, and slew but to triumph over the body of the vanquished." But in the evolution of the principles governing what we may term civilized warfare there have been preserved many of the ancient and old-time doctrines which are so firmly grounded, both from the necessity and reasonableness thereof, that to have excluded them would have been demoralizing in the extreme and against the universal sense of civilized nations.

Unlike the term "law," as used in modern civilized States wherein the statute is imposed and enforced by a superior power, "international law," or those principles which are supposed to govern independent States in international warfare, finds its cohesive force in the voluntary subjugation of such independent States to an enlightened conscience.

Among these well-grounded principles which have become engrafted into international law, and which receive the sanction and acquiescence of enlightened peoples, may be found the principles for which we contend in this case and on which we rely to support the judgment of the court below:

> The invader deals freely with the relations of the inhabitants of the occupied territory toward himself. He suspends the operation of the laws under which they owe obedience to their legitimate ruler, because obedience to the latter is not consistent with his own safety;

> for his security, also, he declares certain acts, not forbidden by the ordinary laws of the country, to be punishable. (Hall's International Law, 5th ed., p. 471–472.)
>
> It has been confessed that it is impossible to set bounds to the demands of military necessity; * * * there may be occasions in which the urgency of peril might excuse excesses such as those committed by Napoleon in Italy and Spain. (*Supra*, p. 474.)

The writer recognizes that under stress of military necessity invading forces may use or destroy both public and private property for purposes of prosecuting war, provided they do not commit wanton damage to public buildings, works of art, libraries, museums, etc. (*Supra*, p. 481).

The property of a foreigner situate within a state where military operations are being pressed becomes an element of strength to the state and may be treated as hostile by an enemy.

> A person though not a resident in a country may be so associated with it through having, or being a partner in, a house of trade there as to be affected by its enemy character, in respect at least of the property which he possesses in the belligerent territory. * * * If, however, the trade is in itself such as to create any special association, through the concession of exceptional privileges or otherwise, between the merchant and the belligerent state, the former becomes impressed with a hostile character relatively to enemies of the state, notwithstanding the fact of his absence. Thus

an American, possessing a tobacco monopoly in the Caracas, but not residing in Spanish territory, and conducting his trade through an agent, was held to have contracted a Spanish mercantile character. (*Supra*, pp. 500–501.)

Property is considered to be necessarily hostile by its origin when it consists in the produce of estates owned by a neutral in belligerent territory, although he may not be resident there. Land, it is held, being fixed, is necessarily associated with the permanent interests of the State to which it belongs, and its proprietor, so far from being able to impress his own character, if it happens to be neutral, upon it or its produce, is drawn by the intimacy of his association with property which can not be moved into identification in respect of it with its national character. (*Supra*, 504.)

Devastation is capable of being regarded independently as one of the permitted kinds of violence used in order to bring an enemy to terms, or as incidental to certain military operations, and permissible only for the purpose of carrying them out. (*Supra*, 533.)

In summing up the author uses the following language:

Finally, all devastation is permissible when really necessary for the preservation of the force committing it from destruction or surrender. (*Supra*, 535.)

A foreigner may have his personal or permanent domicile in one country, and at the same time his constructive or mercantile domicile in another. The national character

> of a merchant, so far as relates to his property engaged in trade, is determined by his commercial domicile. "All such persons * * * are *de facto* subjects of the enemy sovereign, being residents within his territory, and are adhering to the enemy so long as they remain within his territory."
>
> * * * A neutral, or a citizen of the United States, domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation. (See War Power under the Constitution by William Whiting, 2d ed., p. 342.)

In the discussion of the rights of property in hostile territory under the stress of military necessity, the author says:

> The destruction or capture of the property of loyal citizens by military forces invading the loyal States is not an appropriation of property by our Government. * * * But property of such citizens and of such foreigners may be destroyed by our military forces, under certain circumstances, without liability to pay for it. Thus, if one of our armies marches across a cornfield, and so destroys a growing crop, or fires a building which conceals or protects the enemy, or cuts down timber to open a passage for troops through a forest, the owner of such property, citizen or alien, has no legal claim to have his losses made up to him by the United States. Mis-

> fortunes like these must be borne wherever they fall. If any government is obligated to guarantee its subjects against losses by casualties of public war, such obligation must be founded upon some constitutional or statute law. Thus far no such obligations have been recognized in our system of congressional legislation. (*Supra*, 340–341.)

Again:

> The property of all the partners in a trading house in an enemy's country is lawful prize, though some of the partners have a neutral residence. The property of a person may acquire a hostile character, although his residence be neutral. * * * The commercial domicile of a merchant at the time of the capture of his goods determines the character of those goods. If a citizen of the United States establishes his domicile in a foreign country, between which and the United States hostilities afterwards break out, property shipped by such citizen before a knowledge of the war, and captured by an American cruiser after the declaration of war, must be condemned as *lawful prize*. The property of a *house of trade established in an enemy's country* is condemnable as prize, whatever may be the *domicile* of the parties. (*Supra*, pp. 347–348.)

In a full discussion of the right of a belligerent to take or destroy private property under military necessity, the late General Halleck upholds the doctrine that where destruction is necessary in order to

cripple the operations of the enemy or to insure the success of the invading army, the same is permissible, and to this end provisions and forage may be destroyed in order to cut off the enemy's subsistence; fortresses, ramparts, and all structures devoted to the purposes of war may be razed to the ground, but holds that "such violent remedies are to be sparingly applied." (Halleck's International Law, vol. 2, pp. 75–77.)

The foregoing rules are cited and upheld in Taylor's International Public Law, pages 539–447.

So stands the law as furnished by text-book authorities applicable to the facts in the case at bar, and as stated by one author, "no change has taken place in the condition under which war is waged that can justify or excuse a change in practice."

DECISIONS OF THIS COURT SUSTAINING THE FOREGOING DOCTRINE.

We may eliminate everything that has been said by text-book writers in support of the propositions we have announced and turn to the highest authority for confirmation of the principles for which the Government contends in this case.

This court not only interprets and construes statutes, but it sometimes makes law, and its repeated announcements bearing upon the rules which we seek to sustain have become so well known that they establish and firmly fix that which may have been therefore somewhat unsettled and undetermined.

Mr. Justice Field, speaking for the court in the case of *The Cheshire*, said:

> No principle is more firmly settled than that the property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize without regard to the domicile of the partners. The trade of a house of this kind is essentially a hostile trade, and the property employed in its prosecution is therefore treated as enemy's property, though some of the partners may have a neutral domicile. Such trade tends directly to add to the resources and revenues of the enemy, and, as observed by Mr. Justice Story, "there is no reason why he who thus enjoys the protection and benefits of the enemy's country should not, in reference to such a trade, share its dangers and losses. It would be too much to hold him entitled, by a mere neutral residence, to carry on a substantially hostile commerce and at the same time possess all the advantages of a neutral character." (3 Wall., 233.)

In the case of *The Gray Jacket*, Mr. Justice Swayne, speaking for the court:

> The subject lies wholly beyond the sphere of his authority. The liability of the property is irrespective of the *status domicilli*, guilt or innocence of the owner. If it come from enemy territory, it bears the impress of enemy property. If it belong to a loyal citizen of the country of the captors, it is nevertheless as much liable to condemnation as if owned by a

> citizen or subject of the hostile country or by the hostile government itself. (5 Wall., pp. 369–370.)

In the case of *The Friendschaft*, in which Mr. Justice Story delivered the opinion of the court, it was held:

> It has been long since decided in the courts of admiralty that the property of a house of trade, established in the enemy's country, is condemnable as prize, whatever may be the domicile of the parts. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicile of any of the company. (4 Wheat., p. 105.)

In the case of *Miller* v. *United States*, Mr. Justice Strong, in speaking of the power to prosecute war and respecting captures, says:

> It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to

> appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation. (11 Wall., pp. 305–306.)

In the case of *Lamar, executor,* v. *Brown et al.,* 92 U. S. R., 194, it was held:

> For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies.

In the case of *Dow* v. *Johnson,* this court said:

> The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of

> war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty. (100 U. S. R., 170.)

And Mr. Justice Harlan recognizes the principle in the case of *Hijo* v. *United States*, to which we shall hereafter call attention.

The so-called civil war, or war between the States, was conducted on the principles governing international warfare, and in the determination of the rights of individuals this fact has been recognized by this court in many decisions. We desire to call special attention to the case of *The United States* v. *Pacific Railroad Co.* (120 U. S. R., 228), in which Mr. Justice Field delivered the opinion of the court:

> It has been held by this court in repeated instances that, though the late war was not between independent nations, yet, as it was between the people of different sections of the country, and the insurgents were so thoroughly organized and formidable as to necessitate their recognition as belligerents, the usual incidents of a war between independent nations ensued. The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. Their adoption was seen in the exchange of prisoners, the release of officers on parole, the recognition of flags of truce, and other arrangements designed to mitigate the rigors of warfare. The

inhabitants of the Confederate States on the one hand and of the States which adhered to the Union on the other became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other. (*Brown* v. *Hiatts*, 15 Wall., 177, 184.)

The war, whether considered with reference to the number of troops in the field, the extent of military operations, and the number and character of the engagements, attained proportions unequaled in the history of the present century. More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government. By the well-settled doctrines of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully or-

dered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss. *Salus populi* is then, in truth, *suprema lex.*

These views are sustained in treaties of text writers, by the action of Congress, and by the language of judicial tribunals. (*Republica* v. *Sparhawk*, 1 Dall., 357; *Parham* v. *The Justices*, 9 Ga., 341; *Taylor* v. *Nashville & Chattanooga Railroad*, 6 Coldwell, 646; *Mayor* v. *Lord*, 18 Wend., 126.) (Pp. 233–234.)

Again:

The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the Government is not responsible, is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, "a matter of bounty rather than a strict legal right." (239.)

In addition to the foregoing authorities, see:

The Venice, 2 Wall., 258.
The Venus, 8 Cranch., 277.
Bagaley, 5 Wall., 408.
Young, 97 U. S. R., 60.
Lamar, Ex'r., 92 U. S. R., 194.
Hamilton v. *Dillon*, 21 Wall., 94.

In the enactment of the act of March 12, 1863, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States" (12 Stat. L., 820), Congress emphasized its recognition of the fact that the war between the States was being conducted and should be prosecuted under the rules and regulations which had received the sanction and acquiescence of the great civilized nations in respect to international warfare. But Congress further recognized that in the application of these universal rules a number of citizens loyal to the Federal Government would necessarily suffer great hardship in the capture and destruction of their property; property which found its situs in those districts of the country in rebellion against the Federal Government, and which such citizens had no opportunity or power to remove.

In order to guard in so far as possible against the great losses which would be occasioned to such loyal citizens, the Congress in its wisdom provided for the collection of abandoned or captured property in any State or Territory, or any portion thereof, which had been designated as in insurrection, and made provision for the disposition of the same, and then provided in section 3 of the act, as follows:

> And any person claiming to have been the owner of any such abandoned or captured property may, *at any time within two years*

> *after the suppression of the rebellion*, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.

The claimant to the proceeds of such property must conform to the standard set by furnishing sufficient proof to establish the facts:

1. As to his ownership of the property.
2. As to his right to the proceeds thereof.
3. That he had never given any aid or comfort to the present rebellion.

Claim for such proceeds, supported by competent testimony to establish the foregoing facts, must be made within two years after the suppression of the rebellion.

The foregoing act was supplemented somewhat and enlarged with respect to the agents taking charge of and leasing for a certain period abandoned land, houses, tenements, etc., within the districts named by the act of July 2, 1864 (13 Stat. L., 375).

Appellant seeks to recover upon the same footing as those persons who were especially favored by an act of Congress, notwithstanding it is not among the

excepted or favored class recognized by the passage of the abandoned and captured property act.

Congress has not seen proper to extend to appellant and other companies and persons of like situation the right to recover for property destroyed under the circumstances of the case at bar. It has not carved out appellant company as an exception to those who fall within the scope of international warfare, and until some provision is made conferring jurisdiction upon the courts whereby appellant and others similarly situated may have a legal right to recover, such persons and companies must seek a different forum than the Court of Claims or any other court. This claim has no foundation resting upon any principle or upon any of the laws enacted during or after the war of the rebellion under which the Government consented to liability in favor of owners of property seized or destroyed in disloyal territory.

In commenting upon the so-called abandoned and captured property act, Chief justice Waite said:

> The Government of the United States, in passing the abandoned and captured property act, availed itself of its just rights as a belligerent, and at the same time recognized to the fullest extent its duties under the enlightened principles of modern warfare. * * * While all residents within the Confederate territory were in law enemies, some were in fact friends. In the indiscriminate seizure of private property it seemed to Congress that friends might sometimes suffer. * * * As to all persons within the privileges of the act

the proceeds were held in trust, but as to all others the title of the United States as captor was absolute. Whoever could bring himself within the terms of the trust might sue the United States and recover, but no one else. * * *

If he (a nonresident alien) thrust himself inside the enemy's lines, and for the sake of gain acquires title to hostile property, he must take care that it is not lost to him by the fortune of war. While he may not have committed a crime for which he can be personally punished, his offending property may be treated by the adverse belligerent as enemy property. He has the legal right to carry, to sell, and to buy; but the conquering belligerent has a corresponding rank to capture and condemn. He enters into a race of diligence with his adversary and takes the chance of success. The rights of the two are in law equal. The one may hold if he can, and the other seize. (*Young* v. *U. S.*, 97 U. S. R., 60–63.)

It (property captured during the war) was not taken because of its ownership, but because of its character. But for the provisions of the abandoned and captured property act the title to and the proceeds of all captured property would have passed absolutely to the United States. By that act, however, the privilege of suing for the proceeds in the Treasury was granted to such owners as could show they had not given aid or comfort to the rebellion. This was a reward for loyalty, not a punishment for disloyalty. (*Supra*, p. 67.)

This special legislation enacted by the grace of Congress set aside for the time being in favor of loyal citizens the well-recognized rules of international warfare and those persons only who were within the scope of said legislation were affected by its terms.

TUCKER ACT.

We have thus far considered this case upon the assumption that the property destroyed was impressed with the nature and character of enemy property, and further that by its voluntary action in giving situs to its property within the island of Cuba, and from the nature of the business transacted there, appellant company acquired and maintained a commercial domicile in Spanish territory which rendered its property subject to the impress of enemy character. But the case of the *Pacific Railroad Company* v. *The United States*, heretofore cited, goes further, and in effect holds that even were this property considered the property of an American citizen and within the belligerent territory of the United States, the Government would not be responsible for its destruction when caused by necessary military operations. We need not, however, rest the defense to this action upon the well-settled principles heretofore announced. Any standing this appellant may have in the Court of Claims or in this court must find its basis and authority in the first section of what is commonly termed the "Tucker Act," being the act of March 3, 1887, entitled "An act to provide for the bringing of suits against the Government of the

United States." (24 Stat. L., 505.) Said section provides as follows:

> First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same.

The claim in this case we contend is not founded on the Constitution of the United States or of any act of Congress; neither does it find its basis in any regulation of an executive department, nor can it be said to be founded on a contract, either expressed or implied. Indeed, there is no element of contract in the case, for nothing was done by the United States nor anything said by any of its officers from which could be implied an agreement or obligation on the part of the Government to pay for the property destroyed.

Mr. Justice Harlan clearly differentiates between a case wherein may be found the elements of an implied contract and one similar to the case at bar. In the *Hijo case* a Spanish corporation brought suit in the Court of Claims to recover for the use of a certain merchant vessel taken by the United States in the port of Ponce, P. R., on July 28, 1898, during the Spanish war. The doctrine of implied contract is not disturbed, and the learned jurist gave sanction to the opinion formerly expressed by this court to the effect that the law will imply a promise to make compensation *where private property is taken for public uses, pursuant to an act of Congress*, but in distinguishing the cases, said:

> The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. * * * If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract because of the retention and use of the vessel pending negotiations for a treaty of peace. (*Hijo* v. *U. S.*, 194 U. S. R., 323.)

In the case cited the claim appears to have much more merit and more closely approaches the requirements necessary in order to maintain a suit under the Tucker Act than in the case at bar. The vessel was seized by the United States and used by the Quartermaster's Department of the United States Army. The Government had the benefit of the use of the ship from July 28, 1898, until April, 1899. No such equitable feature can be found in the case at bar. This destruction of appellant's property occurred while war was flagrant; the lives of the United States forces were endangered by the prevalence of yellow fever; the spread of the disease was imminent; the buildings in question harbored the germs of the fever within their walls; the lives of the United States soldiers were in jeopardy, and the buildings, with their infectious germs, were situated in the midst of territory at a point where the United States Army was operating. The invading forces had more to fear from pestilence and disease than from Spanish bullets, and the United States authorities, recognizing the urgent military necessity therefor, resorted to the purifying power of fire to prevent great loss of life. These buildings were not taken for the use of the army, they were not used by the army, and their destruction arose only from the necessities heretofore stated.

Appellant's property was the instrument whereby great damage and irreparable injury would be done to the United States soldiers and officers. The officials

could not tear down or remove the buildings, for such action would but add to the danger of contracting disease. Whatever property of a personal nature was upon the premises could not be removed for the same reason. No recourse was left in order to prevent dire consequences to the invading forces other than the one adopted by General Miles.

This appellant company having established a commercial domicile in Spanish territory, such as has been shown by the facts in this case, certainly is not entitled to recover under the plea of implied contract for property destroyed under such circumstances as set forth in the record.

There is no provision in the act of March 3, 1887, whereby appellant can successfully maintain its action. The seizure and destruction may have made a case sounding in tort, but it is not one of contract, either expressed or implied.

GENERAL ORDERS, NO. 101.

In the court below, counsel for the appellant seemed to derive some comfort from General Orders, No. 101, and in their brief said:

> The order of General Miles directing the destruction of this property was given on July 11, 1898, and seven days later, on July 18, President McKinley issued the following order, which clearly shows the intention and desire of the Government of the United States to make just compensation for private property appropriated for the use of the army.

The orders to which reference was made are as follows:

> Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity, are not to be retained. * * * Private property taken for the use of the army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible, receipts are to be given. (General Orders, No. 101, A. G. O., series of 1898, Richardson's Messages of the Presidents, Vol. X.)

It must be remembered that these orders were issued at a time when it was expected that the United States forces would be necessitated to take for their subsistence and use certain property in conquered territory, but in the destruction of the buildings in question they were not taken for the use of the army, either for hospitals or as shelter for the troops. They were destroyed not for the use of the American forces, but for their protection. Therefore, General Orders, No. 101, afford no basis whereby the claimant is entitled to recover on the theory of implied contract. The orders did not and could not change the universally adopted international rules of civilized warfare.

The President had not the power nor the authority, without being specially authorized by Congress, to

create an obligation which is not recognized by the well-known principles of law; and nothing less than an act of Congress can be relied upon to change the rule as heretofore stated and impose an obligation for the payment of property destroyed under like circumstances. No protection is afforded by orders of the President except in so far as such orders are warranted by law.

In the case of *Little et al.* v. *Barreme et al.* (2 Cranch.) Chief Justice Marshall said:

> I confess, the first bias of my mind was very strong in favor of the opinions, that though the instructions of the Executive could not give a right, they might yet excuse from damages. * * * I was strongly inclined to think that where in consequence of orders from the legitimate authority a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is that the instructions can not change the nature of the transaction, nor legalize an act which without those instructions would have been plain trespass. (*Supra*, side p. 179.)

CONCLUSION.

For a further discussion and citation of authorities we respectfully refer the court to the clear and concise opinion delivered by Judge Barney of the court

below. (Rec., pp. 6 to 8, inclusive.) This appellant gave a permanent situs to its property in Spanish territory. It paid taxes and presumably conformed to the laws and requirements of the state where the property was situated. In this sense it was a supporter of the Spanish Government and its property was liable to such extraordinary subsidies as the prosecution of a war might demand. We do not think that the trial court committed error in dismissing the petition, and therefore ask that the judgment of the court below be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE JURAGUA IRON COMPANY, LIMITED, Appellant, *v.* THE UNITED STATES. } No. 34.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

Claimants' counsel contend for the right of recovery under the treaty of 1795 between the United States and the Kingdom of Spain. Article 13 of said treaty provides:

> For the better promoting of commerce on both sides, it is agreed that if a war shall break out between the two nations one year shall be allowed to the merchants of the cities and towns where they shall live for collecting and transporting their goods and merchandises; and if anything be taken from them or any injury be done them within that term by either party or the people or subjects of either, full satisfaction shall be made for the same by the Government.

It was the law of nations and the rules of war that upon the breaking out of a war between two nations each had the right to seize and confiscate the

private property of any of the subjects found within the territory limits of such nation. The article quoted was not intended to protect any and every kind of property owned by subjects of the one nation within the territory limits of the other. The article does not apply to real estate, buildings, fixed machinery, or other property than that of merchandise or goods which might be moved immediately. The buildings destroyed were not covered by article 13 of this treaty.

But it will be seen upon examination of the public records that the treaty was not in force at the time this property was destroyed. Ambassador Hay cabled to the Secretary of State from London on May 7, 1898, the following:

> The Spanish Government have informed British embassador, Madrid, that the whole of the treaty of 1795 is abrogated, but if the Government of the United States will propose through British embassy an agreement embodying conditions of article 13, Spanish Government will accept. Agreement must be limited to merchandise. (Foreign Relations, 1898, p. 972.)

The State Department replied on May 8, 1898, by telegram from Secretary Day to Ambassador Hay, as follows:

> The department does not consider treaty provisions expressly applicable to war between contracting parties as abrogated by war and therefore can not propose or make

new agreement embodying the conditions of article 13, treaty 1795; so inform the British embassy, Madrid.

Subsequent correspondence quoted in Foreign Relations (p. 971 and succeeding pages) shows that the Spanish Government would not accede to the proposition that the whole of the treaty of 1795 was not abrogated and it appears affirmatively that no further action toward making a new agreement was taken. The Government of Spain remained consistent in its refusal to agree that any part of the treaty of 1795 remain in force during the war. (Negotiations for the treaty of Paris, Senate Document 62, Part II, 55th Congress, third sess., pp. 254, 255.)

The history of the progress of the Spanish war will show that the United States by its own acts acquiesced in the act of Spain in abrogating the whole of its treaty upon the declaration of war. The President's proclamation declaring war against Spain was issued April 22, 1898. The Spanish decree stating, among other things, that the treaty was terminated was issued April 23, 1898. On April 26, 1898, the President issued a proclamation in which he declared that Spanish merchant vessels in ports of the United States should be allowed until May 21, 1898, to load and depart. (Foreign Relations, 1898, p. 772.) This, it will be noted, if not an express abrogation of article 13, is at least utterly inconsistent with that

article which allowed Spaniards a year in which to remove personal property. The Government of Spain by her decree of April 23, 1898, allowed ships belonging to the United States five days within which to depart from Spanish ports. The instructions of June 20, 1898, issued to the United States blockading vessels were wholly inconsistent with this article of the treaty of 1795.

This court decided in the case of *Buena Ventura* (175 U. S., 384) that but for the proclamation of April 26, 1898, allowing Spanish vessels until May 21 to clear and depart the ship would have been liable to seizure and condemnation as enemy's property. This could not possibly have been true if there was any question that article 13 of the treaty of 1795 had not been abrogated. The same question arose in the case of the *Panama* (176 U. S., 535), and again this court decided that the vessel would be liable to capture unless protected by the President's proclamation.

It is clear, in any event, that in this article the United States has not created any obligation to its own citizens. The whole purpose of the treaty is to fix a responsibility on each nation for the protection of the property of the citizens of the other nation.

Finally, the Court of Claims has no jurisdiction of a claim "growing out of or dependent on any treaty stipulation entered into with foreign nations." (R. S., sec. 1066.) There is no such condi-

tion in the case at bar as would bring the claim within the rule announced in the case of *United States* v. *Weld* (127 U. S., 51), where the jurisdiction was held to depend on the statute and not on the treaty. The action of the President in approving General Orders, No. 101, is not such executive action as to create an obligation and is not enough to avoid section 1066, R. S., as construed by this court. The claim in this view of the case is clearly one growing out of and depending on the treaty, and there is nothing from which a contract can be implied. (*Great Western Ins. Co.* v. *United States,* 112 U. S., 193; *Alling* v. *United States,* 114 U. S., 562; *Langford* v. *United States,* 101 U. S., 341.)

In the Langford case, this court, quoting from the Gibbons case (7 Wall., 269), says:

> It is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officers, those acts being in themselves torts. * * * The language of the statutes, which confer jurisdiction upon the Court of Claims, excludes, by the strongest implication, demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while en-

> gaged in the discharge of official duties. * * * These reflections admonish us to be cautious that we do not permit the decision of this court to become authority for righting in the Court of Claims all wrongs done to individuals by the officers of the General Government, though they have been committed while serving the Government and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination.

In view of the foregoing, we contend that appellant has no standing in the courts whereby it may recover under article 13 of the treaty of 1795.

JOHN Q. THOMPSON,
Assistant Attorney-General.

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JURAGUA IRON COMPANY, LIMITED, v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 34. Argued December 2, 3, 1908.—Decided February 23, 1909.

No action can be maintained against the United States for the destruction or taking of property under the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, unless the United States is bound by express or implied contract to compensate the owner therefor or unless the case be one not sounding in tort.

Under the recognized rules of war Cuba, being a part of Spain, was during the war of 1898–9, enemy country; and all persons residing in Cuba pending the war were to be deemed enemies whatever their nationality, including citizens of the United States there domiciled and doing business.

Property of citizens of the United States in Cuba was during the war with Spain to be regarded as enemy property subject to the laws of war, and to be destroyed whenever military necessity so demanded; nor could a citizen of the United States invoke the protection of the Constitution pending the war for his property in Cuba any more than could a Spanish subject.

A citizen of the United States domiciled in Cuba cannot maintain an action against the United States under the act of March 3, 1887, in the Court of Claims for the value of property destroyed during, and as the result of, military operations in Cuba by order of the commanding officer in the field as there is no obligation based on implied contract to compensate for the value of such property. If the order was not justified by the rules of war it would amount to a tort, and the action based thereon would be one sounding in tort, and the action cannot be maintained.

Quære, and not decided, whether the act of March 3, 1887, c. 359, 24 Stat. 505, supersedes or modifies § 1066, Rev. Stat., and § 9 of the act of March 3, 1863, c. 92, 12 Stat. 767, relating to claims against the United States growing out of, or dependent on, treaty stipulations.

42 C. Cl. 99, affirmed.

THE facts are stated in the opinion.

Mr. Frederic D. McKenney and *Mr. John Spaulding Flannery*, with whom *Mr. Wayne MacVeagh* and *Mr. William Hitz* were on the brief, for appellant:

The war with Spain was not against Cuba nor against the Cuban people, nor against aliens domiciled or found within its borders and there engaged in the peaceful pursuits of commerce. It was a war solely against Spain, undertaken by the United States because of the abhorrent conditions which had been brought about in Cuba by Spain and which could not longer be endured. It was undertaken by the United States in the interest of Cuba and on behalf of her peoples, and because those people were and of right ought to be free and independent, and because it was the duty of the United States to demand that the government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. See *Neely* v. *Henkel*, 180 U. S. 109.

But even if this were not all so, and if the mere *situs* of the claimants' property within the territorial sovereignty of the enemy stamped it as "enemy property," nevertheless, under well-recognized principles of modern international law, as well as under the modern military law governing the armies of the United States in the field, and binding as well upon the Government as upon those who become subject to its power, the Juragua Iron Company became and is entitled to compensation for its property so seized and destroyed. Article 38, § 11, General Orders, No. 100; General Orders, No. 101.

General Orders, No. 101, promulgated through the War Department by President McKinley, did not announce any new principle either of law or liability. It merely reiterated certain well-understood principles of international law, founded in equity and moral right and accepted and acted upon by all civilized nations. It was scarcely more than a reiteration in condensed form, of Lieber's instructions, as proclaimed by direction of President Lincoln in 1863 in General Orders, No. 100; afterwards adopted by the United German Empire

for the government and regulation of its armies; formulated into a code by Bluntschli; made the basis of the Brussels agreement of 1879; adopted by The Hague convention of 1899 and latterly reannounced, practically in its original form in The Hague convention of 1907 "with respect to the laws and customs of war on land," to the last two of which conventions the United States has formally indicated their adherence. See *Hilton* v. *Guyot*, 159 U. S. 113, 163; *Fremont* v. *United States*, 17 How. 542, 557; *The Scotia*, 14 Wall. 170, 188; *Respublica* v. *De Longchamps*, 1 Dall. 111, 116; *Moultrie* v. *Hunt*, 23 N. Y. 394, 396; *The Paquete Habana*, 175 U. S. 677, 700, 701.

The obligation of a belligerent to pay for private property taken or destroyed under circumstances not involving actual military operations—that is, in battle, or the course of bombardment, and the like—is recognized and declared by practically all text-writers who have treated of the subject. Kent's Commentaries, 92, 93; Hall's International Law, 441, 442; 2 Halleck's International Law, 68; Treatise on International Law, by Cushman K. Davis, 144–146. See also dissenting opinion of Commissioner Maury (Spanish Treaty Claims Commission) in case of *Juragua Iron Co.* v. *United States; Mitchell* v. *Harmony*, 13 How. 115; *McKenna* v. *Fisk*, 1 How. 241; *United States* v. *Russell*, 13 Wall. 623; *United States* v. *Pacific R. R. Co.*, 120 U. S. 227; *Putegnat Heirs* (Mexican Claims Commission), 4 Moore's International Arbitrations, 3718; *Grant* v. *United States*, 1 C. Cls. 41; *United States* v. *Lynah*, 188 U. S. 445.

Mr. Assistant Attorney General Thompson, for appellee:

Under stress of military necessity, invading forces may use or destroy both public and private property for purposes of prosecuting war, provided that they do not commit wanton damage. The property of a foreigner situated within a state where military operations are being pressed becomes an element of strength to the state and may be treated as hostile by an enemy. Hall's International Law (5th ed.), pp. 471, 472, 474, 481; War Power under the Constitution, by William Whit-

ing (2d ed.), p. 342; 2 Halleck's International Law, pp. 75–77; *The Cheshire*, 3 Wall. 233; *The Gray Jacket*, 5 Wall. 369, 370; *Miller* v. *United States*, 11 Wall. 305, 306; *Lamar* v. *Browne*, 92 U. S. 187, 194; *Dow* v. *Johnson*, 100 U. S. 170; *Hijo* v. *United States*, 194 U. S. 315; *United States* v. *Pacific R. R.*, 120 U. S. 228; *The Venice*, 2 Wall. 258; *The Venus*, 8 Cranch, 277; *Bagaley*, 5 Wall. 408; *Young* v. *United States*, 97 U. S. 60; *Hamilton* v. *Dillon*, 21 Wall. 94.

Any standing this appellant may have in the Court of Claims or in this court must find its basis and authority in the first section of what is commonly termed the Tucker Act, of March 3, 1887, to provide for the bringing of suits against the Government of the United States. 24 Stat. 505.

The claim in this case is not founded on the Constitution of the United States or on any act of Congress; neither does it find its basis in any regulation of an executive department, nor can it be said to be founded on a contract, either expressed or implied. Indeed, there is no element of contract in the case, for nothing was done by the United States nor anything said by any of its officers from which could be implied an agreement or obligation on the part of the Government to pay for the property destroyed. See *Hijo* v. *United States*, 194 U. S. 315.

This appellant company having established a commercial domicil in Spanish territory, such as has been shown by the facts in this case, certainly is not entitled to recover under the plea of implied contract for property destroyed under such circumstances as set forth in the record.

There is no provision in the act of March 3, 1887, whereby appellant can successfully maintain its action. The seizure and destruction may have made a case sounding in tort, but it is not one of contract, either expressed or implied.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought in the Court of Claims to recover from the United States the alleged value of certain property

destroyed in Cuba, during the war with Spain, by order of the officer who at the time of its destruction commanded the troops of the United States operating in the locality of the property.

The case depends altogether upon the facts found by the court. We cannot go beyond those facts.

The Court of Claims found that the Juragua Iron Company (Limited) was a corporation of Pennsylvania, having its principal office and place of business in Philadelphia and was and for many years had been engaged in the business of mining and selling iron ore and other mineral products in the United States, Cuba and elsewhere and in manufacturing iron and steel products; that it was so engaged at the opening of the late war with Spain; and to enable it to carry on business it owned, leased and operated mines in Cuba, maintaining offices, works and the necessary tools, machinery, equipments and supplies for its business in the Province of Santiago de Cuba, at or near Siboney, Firmeza and La Crux; that in addition to its mines, works and their equipments, the company also owned real estate at or near Siboney, which was improved by 66 buildings of a permanent character, used for the purposes of its business and occupied by its employés as dwellings and for other purposes; that in the year 1898, and "while the war with Spain was in progress, the lives of the United States troops who were engaged in military operations in the Province of Santiago de Cuba, in the belligerent prosecution of the war, became endangered by the prevalence of yellow fever, and it was deemed necessary by the officers in command, in order to preserve the health of the troops and to prevent the spread of the disease, to destroy all places of occupation or habitation which might contain the fever germs;" that on or about the eleventh of July, 1898, General Miles, commanding the United States forces in Cuba, because of the necessity aforesaid and by the advice of his medical staff, issued orders to destroy by fire these 66 buildings at Siboney, which belonged to the claimant and had been used for the purposes aforesaid; that pursuant to that order such buildings and their contents were destroyed by fire by the military authorities of

the United States; that the reasonable value of the buildings at the time and place of destruction was $23,130, and the reasonable value of the drills, furniture, tools and other personal property so destroyed by fire was seven thousand nine hundred and eighty-six dollars ($7,986), making a total of thirty-one thousand one hundred and sixteen dollars ($31,116).

As a conclusion of law the court found that the United States was not liable to pay any sum to the plaintiff on account of the damage aforesaid and dismissed the petition.

It is to be observed at the outset that no fact was found that impeached the good faith, either of General Miles or of his medical staff, when the former, by the advice of the latter, ordered the destruction of the property in question; nor any fact from which it could be inferred that such an order was not necessary in order to guard the troops against the dangers of yellow fever. It is therefore to be assumed that the health, efficiency and safety of the troops required that to be done which was done. Under these circumstances was the United States under any legal obligation to make good the loss sustained by the owner of the property destroyed?

By the act of March 3d, 1887, providing for the bringing of suits against the Government of the United States the Court of Claims was given jurisdiction to hear and determine all claims "founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department or upon any contract, expressed or implied, with the Government of the United States or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of equity or admiralty if the United States were suable. 24 Stat. 505, c. 359.

Manifestly, no action can be maintained under this statute unless the United States became bound by *implied* contract to compensate the plaintiff for the value of the property destroyed, or unless the case—regarding it as an action to recover damages—be one "*not* sounding in *tort*."

The plaintiff contends that the destruction of the property by order of the military commander representing the authority and power of the United States was such a taking of private property for public use as to imply a constitutional obligation, on the part of the Government, to make compensation to the owner. Const. Amend. V. In support of that view it refers to *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656; *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 597–8; *United States* v. *Lynah*, 188 U. S. 445. Let us examine those cases.

United States v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656, was a case of the taking for public use by agents and officers of the United States proceeding under the authority of an act of Congress of certain private property—lands, water rights and privileges—which were held and used by the Government for nearly twenty years, without any compensation being made to the owner. A suit was brought against the United States in the Court of Claims, and judgment was rendered for the claimant. This court said: "It seems clear that these property rights have been held and used by the agents of the United States under the sanction of legislative enactments by Congress; for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the Government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the Nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing in some way payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the Government as a taking un-

der its sovereign right of eminent domain, demand just compensation. *Kohl* v. *United States*, 91 U. S. 367, 374. In that view we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.'"

In reference to the subsequent case of *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, 597, it may be said that so far as it has any bearing upon the present controversy it reaffirms the principle announced in *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656. The court said: "It is sufficient to say that the record discloses nothing showing that he [the Secretary of War] has taken more land than was reasonably necessary for the purposes described in the act of Congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the Government is under a constitutional obligation to make compensation for any property or property right taken, used, and held by him for the purposes indicated in the act of Congress, whether it is embraced or described in said survey or map, or not. . . . Even if the Secretary's survey and map, and the publication of the Attorney General's notice did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the Government recognizes and

retains the possession taken in its behalf for the public purposes, indicated in the act under which its officers have proceeded."

In *United States* v. *Lynah*, 188 U. S. 445, 464–5, which involved the inquiry whether the injury done to certain lands as the result of work done on the Savannah River by the United States was a taking of private property for public use, the court said: "The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. . . . So the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation. . . . Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor."

It is clear that these cases lend no support to the proposition that an implied *contract* arose on the part of the United States to make compensation for the property destroyed by order of General Miles. The cases cited arose in a time of peace and in each it was claimed that there was within the meaning of the Constitution an actual taking of property for the use of the United States, and that the taking was by authority of Congress. That taking, it was adjudged, created by implication an obligation to make the compensation required by the Constitution. But can such a principle be enforced in respect of property destroyed by the United States in the course of military operations for the purpose, and only for the purpose, of protecting the health and lives of its soldiers actually engaged at the time in war in the enemy's country? We say "enemy's country" because, under the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there were, pending such war, to be

deemed enemies of the United States and of all its people. The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject under the laws of war to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy.

In *Miller* v. *United States*, 11 Wall. 268, 305, the court, speaking of the powers possessed by a nation at war, said: "It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is the right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality." In *Lamar's Ex'r* v. *Browne*, 92 U. S. 187, 194, the court said: "For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies." "All property within enemy territory," said the court in *Young* v. *United States*, 97 U. S. 39, 60, "is in law enemy property, just as all persons in the same territory are enemies. A neutral owning property within the enemy's lines holds it as enemy property, subject to the laws of war; and if it be hostile prop-

erty, subject to capture." Referring to the rules of war between independent nations as recognized on both sides in the late Civil War, the court, in *United States* v. *Pacific Railroad Co.*, 120 U. S. 227, 233, 239, said: "The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. . . . The inhabitants of the Confederate States on the one hand and of the States which adhered to the Union on the other became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other. *Brown* v. *Hiatts*, 14 Wall. 177, 184. . . . More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government. By the well-settled doctrines of public law it was not responsible for them. . . . The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the Government is not responsible, is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, 'a matter of bounty rather than of strict legal right.'" See also *The Venus*, 8 Cranch, 253, 278; *The Venice*, 2 Wall. 258, 275; *The Cheshire*, 3 Wall. 231, 233; *The Gray Jacket*, 5 Wall. 342, 345, 369; *The Friendschaft*, 4 Wheat. 105, 107; *Griswold* v. *Waddington*, 16 Johns. 438, 446-7; Vattel, b. 3, c. 5, § 70, and c. 4, § 8; Burlamaqui, Pt. 4, c. 4, § 20.

So in Hall's International Law, 5th ed., 500, 504, 533: "A person though not a resident in a country may be associated with it through having or being a partner in a house of trade as to be affected by its enemy character, in respect at least of the

property which he possesses in the belligerent territory." In Whiting's War Powers Under the Constitution, 340, 342, the author says: "A foreigner may have his personal or permanent domicile in one country, and at the same time his constructive or mercantile domicile in another. The national character of a merchant, so far as relates to his property engaged in trade, is determined by his commercial domicile. 'All such persons . . . are *de facto* subjects of the enemy sovereign, being residents within his territory, and are adhering to the enemy so long as they remain within his territory.' . . . A neutral, or a citizen of the United States, domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation."

In view of these principles—if there were no other reason—the plaintiff corporation could not invoke the protection of the Constitution in respect of its property used in business in Cuba, during the war, any more than a Spaniard residing there could have done, under like circumstances, in reference to his property then in that island. If the property destroyed by order of General Miles had belonged at the time to a resident Cuban, the owner would not have been heard in any court, under the facts found, to claim, as upon implied contract, compensation from the United States on account of such destruction. How then under the facts found could an obligation, based on implied contract, arise under the Constitution in favor of the plaintiff, an American corporation, which at the time and in reference to the property in question had a commercial domicil in the enemy's country? It is true that the army, under General Miles, was under a duty to observe the rules governing the conduct of independent nations when engaged in war—a duty for the proper performance of which the United States may have been responsible in its political capacity to the enemy government. If what was done was in conformity to those rules—as upon the facts found we must assume that it was—then the

owner of the property has no claim of any kind for compensation or damages; for, in such a case the Commanding General had as much right to destroy the property in question if the health and safety of his troops required that to be done, as he would have had if at the time the property had been occupied and was being used by the armed troops of the enemy for hostile purposes. In the circumstances disclosed by the record it cannot reasonably be said that there was, in respect of the destruction of the property in question, any "convention between the parties," any "coming together of minds," or any circumstances from which a *contract* could be implied. *Russell* v. *United States*, 182 U. S. 516, 530; *Harley* v. *United States*, 198 U. S. 229, 234. Again, if, as contended—without, however, any basis for the contention—the acts of that officer were not justified by the laws of war, then the utmost that could be said would be that what was done pursuant to his order amounted to a tort, and a claim against the Government for compensation on account thereof would make a case "sounding in tort." But of such a case the court would, of course, have no jurisdiction under the act of Congress.

In this connection we may refer to *Hijo* v. *United States*, 194 U. S. 315, 322, in which the United States was sued by a Spanish corporation for the value of the use of a merchant vessel taken by the United States in the port of Porto Rico, when that city was captured by our army and navy on July 28th, 1898, and kept and used by the Quartermaster's Department for some time thereafter. The court said: "There is no element of contract in the case; for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. According to the established principles of public law, the owners of the vessel being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for the purposes of war, and not for any purposes of gain."

After observing that the case did not come within the principle announced in *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656, the court proceeded: "The seizure, which occurred while the war was flagrant, was an act of war occurring within the limits of military operations. The action, in its essence, is for the recovery of damages, but as the case is one sounding in tort no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort, because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. . . . If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract, because of the retention and use of the vessel pending negotiations for a treaty of peace."

In our judgment there is no element of contract in the claim of the plaintiff. And even if it were conceded that its property was wrongfully and unnecessarily destroyed under the order of the general commanding the United States troops, the concession could mean nothing more, in any aspect of the case, than that a tort was committed by that officer in the interest of the United States. But, as already said, of a cause of action arising from such a tort the Court of Claims could not take cognizance, whatever other redress was open to the plaintiff.

It may be well to notice one other matter referred to in argument. Section 1066 of the Revised Statutes provided that the jurisdiction of the Court of Claims "shall not extend to any claim against the Government not pending therein on December 1st, 1862, growing out of or dependent on treaty stipulations entered into with foreign nations or with the Indian tribes." Act of March 3, 1863, 12 Stat. 767, c. 92, § 9. We need not now consider or definitely determine whether that section was superseded or modified by the above act of March 3, 1887; for, if it was, and if an implied contract could in any case arise from a treaty stipulation, there is nothing in any treaty with Spain

which stood in the way of the destruction of the buildings in question under the circumstances stated in the findings without liability on the part of the United States for their value; and if that section was not superseded or modified, then the law is for the United States, because of the absence of any implied contract entitling the plaintiff, under the facts found, to be compensated for the loss sustained by it.

Having noticed all the questions that require consideration and finding no error in the record, the judgment of the Court of Claims must be affirmed.

It is so ordered.

END OF CASE